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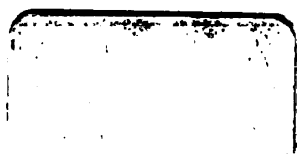
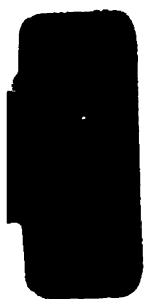
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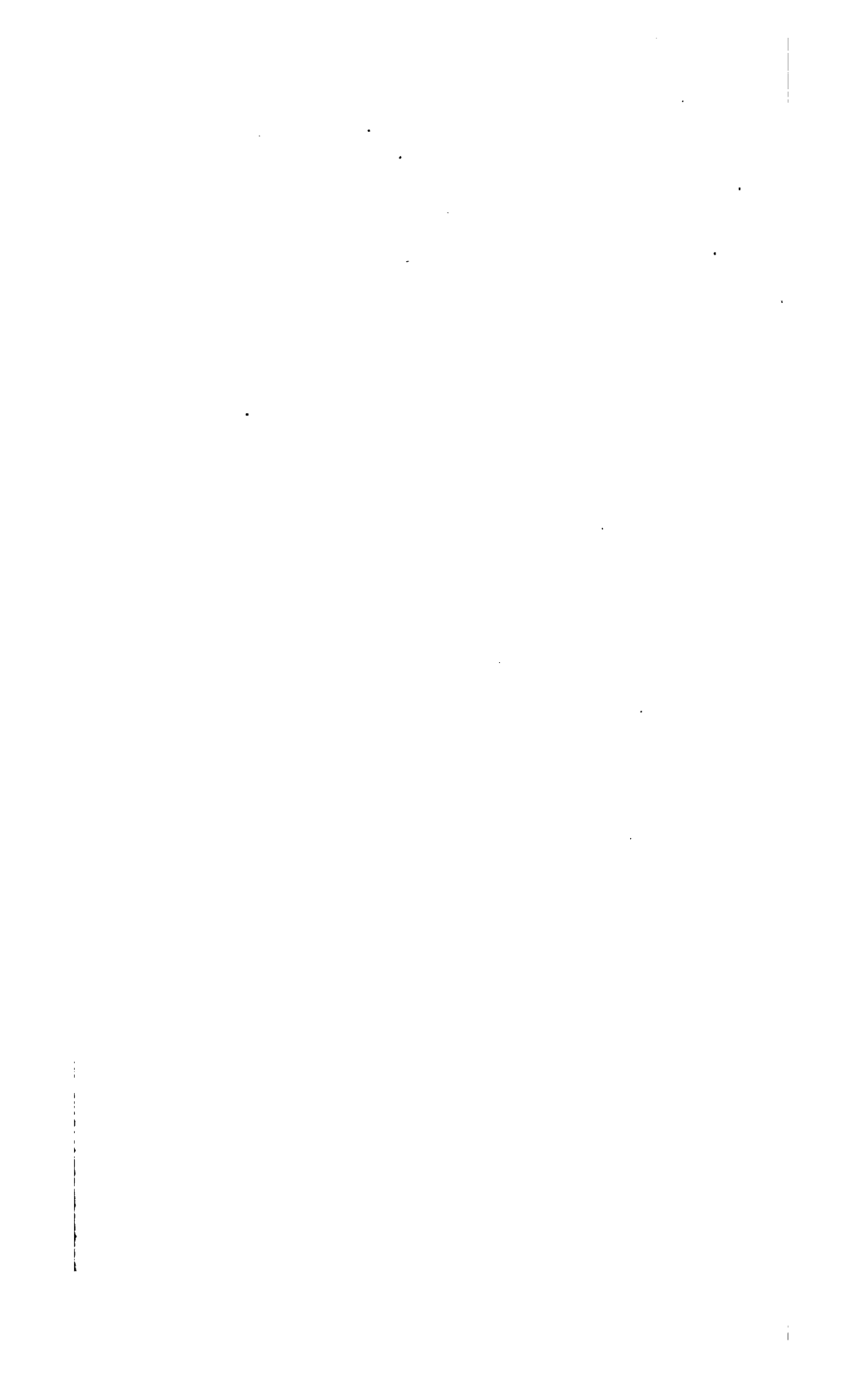
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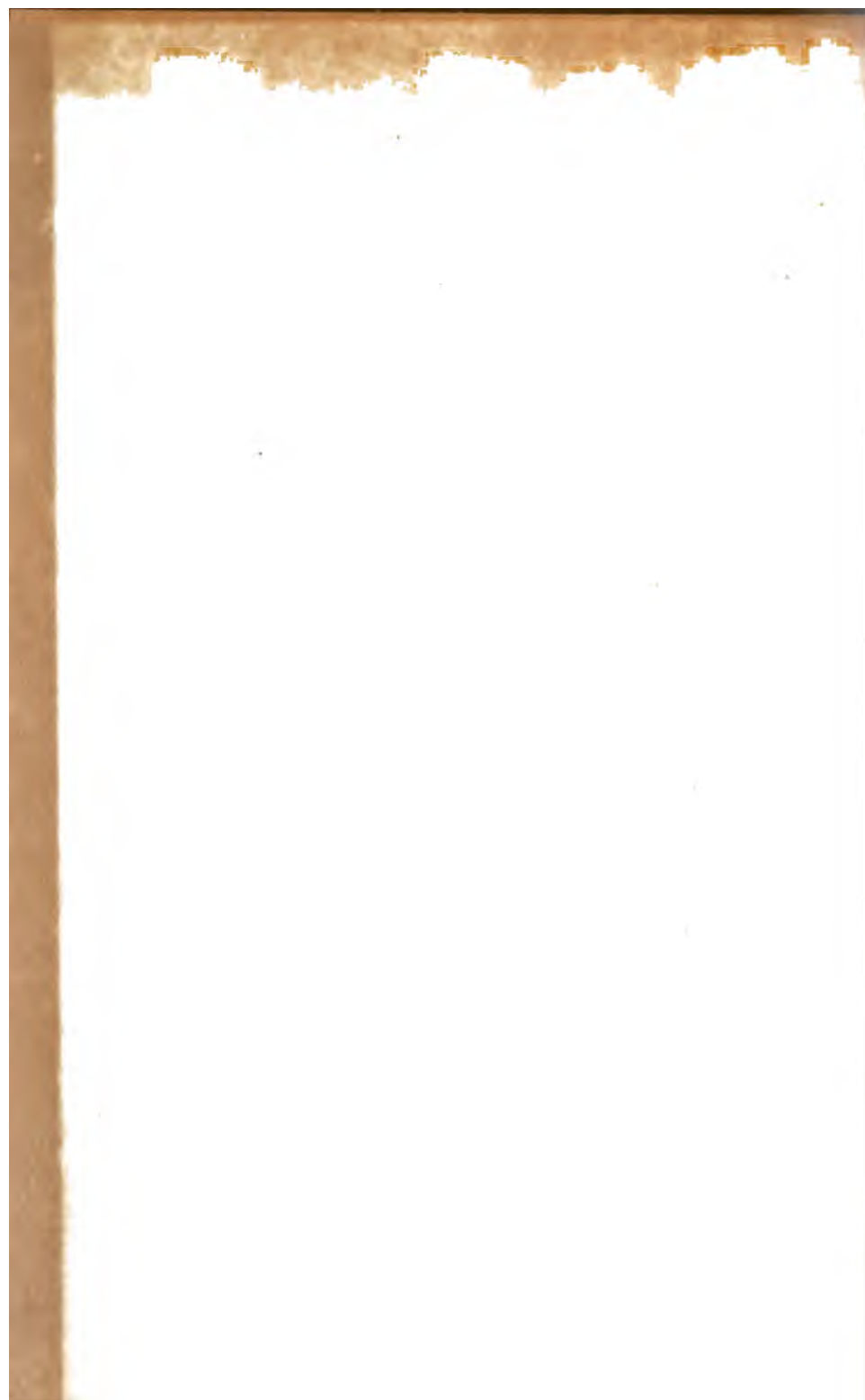
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AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

VOL. LIX.

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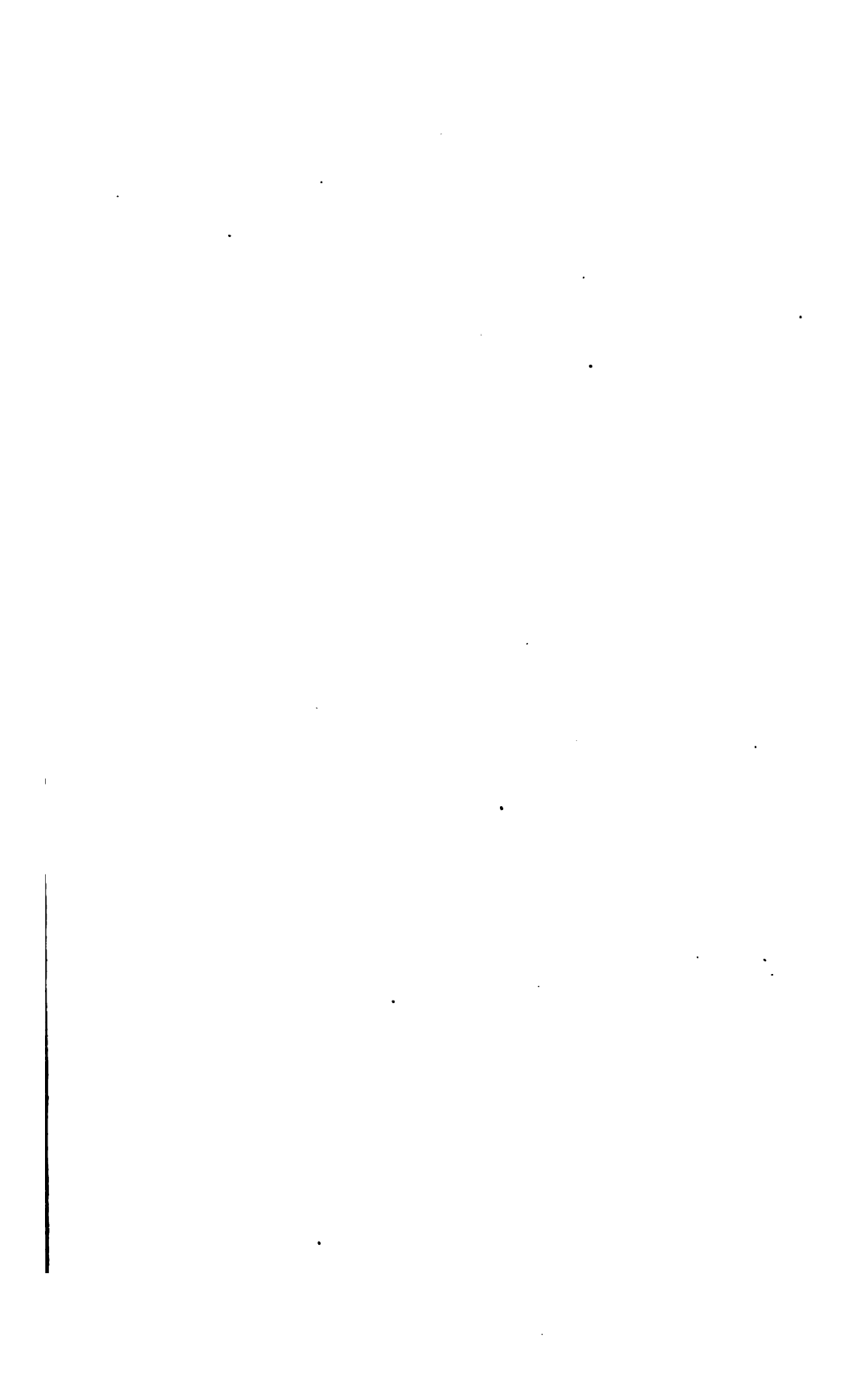
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- Am. Rapid Tel. Co. v. Conn. Telep. Co.* (49 Conn. 352; 44 Am. Rep. 287), denied; *Chesapeake, etc., Telep. Co. v. Balt. and O. Tel. Co.* (66 Md. 399), 171.
- Arnold v. U. S.* (9 Cranch, 104), denied; *Parkinson v. Brandenburg* (35 Minn. 294), 326.
- Barton v. Thompson* (46 Iowa, 30; 26 Am. Rep. 131), denied; *Cont. Ins. Co. v. Jachnichen* (110 Ind. 59), 198.
- Bean v. Parker* (17 Mass. 608), denied; *Trustees of Schools v. Scheik* (119 Ill. 579), 832.
- Besley v. Lawrence* (11 Pa. 581), denied; *Matter of Bates* (118 Ill. 524), 836.
- Blight v. Fisher* (Pet. C. C. 41), denied; *Palmer v. Rowan* (21 Neb. 452), 845.
- Boxraem v. Wheeler* (12 Vt. 811), denied; *Palmer v. Rowan* (21 Neb. 452), 845.
- Brown v. Jetmore* (70 Mo. 223), denied; *Trustees of Schools v. Sheik* (119 Ill. 579), 832.
- Brownell v. People* (38 Mich. 732), doubted; *Stephenson v. State* (110 Ind. 353), 222.
- Commonwealth v. Smith* (102 Mass. 144), denied; *State v. Lockyear* (95 N. C. 633), 292.
- Delaney v. State* (41 Tex. 601), overruled; *Smith v. State* (22 Tex. Ct. App. 1), 774.
- Ferry v. Burchard* (21 Conn. 602), denied; *Trustees of Schools v. Sheik* (119 Ill. 579), 832.
- Graff v. Evans* (8 Q. B. Div. 873), denied; *State v. Lockyear* (95 N. C. 633), 292.
- Hunter v. Cleveland* (1 Brev. 167), denied; *Palmer v. Rowan* (21 Neb. 452), 845.
- Kane v. Hibernia Ins. Co.* (38 N. J. L. 441; 20 Am. Rep. 409), denied; *Cont. Ins. Co. v. Jachnichen* (110 Ind. 59), 198.
- Knowles, Petitioner* (18 R. I. 90), denied; *Matter of Bates* (118 Ill. 524), 836.
- Lee v. Muggeridge* (5 Taunt. 36), doubted; *Stevenson v. Sanders* (59 Vt. 499), 752.
- Mallory v. Hiles* (4 Metc. [Ky.] 53), denied; *Parkinson v. Brandenburg* (35 Minn. 294), 326.
- Markham v. Jaudon* (41 N. Y. 235), denied; *Brewster v. Van Liew* (119 Ill. 554), 827.
- Matthews v. Zane* (7 Wheat. 164), denied; *Parkinson v. Brandenburg* (35 Minn. 294), 326.
- Mayor of Washington v. Meigs* (1 McArth. 58; 29 Am. Rep. 578), denied; *State v. City of Topeka* (36 Kans. 76), 531.

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- People v. Clark** (1 Cal. 406), denied; **Parkinson v. Brandenburg** (35 Minn. 294), 326.
- People v. Cottrell** (18 Johns. 115), denied; **Smith v. State** (23 Tex. Ct. App. 1), 774.
- Russell v. Annable** (109 Mass. 72; 12 Am. Rep. 665), denied; **Trustees of Schools v. Sheik** (119 Ill. 579), 882.
- Seim v. State** (55 Md. 565; 39 Am. Rep. 419), denied; **State v. Lockyear** (95 N. C. 633), 291.
- State v. Mitchell** (5 Ired. 350), denied; **Smith v. State** (23 Tex. Ct. App. 1), 774.
- St. John v. Insurance Co.** (13 N. Y. 31; 64 Am. Dec. 529), denied; **Mo. Valley L. Ins. Co. v. McCrum** (36 Kans. 146), 540.
- Taft v. Hoppin** (Anth. N. P. 255), denied; **Palmer v. Rowan** (31 Neb. 452), 845.
- Tennessee Club of Memphis v. Dwyer** (11 Lea, 452; 47 Am. Rep. 296), denied; **State v. Lockyear** (95 N. C. 633), 292.
- Valton v. Assurance Co.** (20 N. Y. 32), denied; **Mo. Valley L. Ins. Co. v. McCrum** (36 Kans. 146), 540.
- Whitcomb v. Whiting** (2 Doug. 652), denied; **Willoughby v. Irish** (35 Minn. 63), 300.
- Wood v. Washburn** (3 Pick. 24), denied; **Trustees of Schools v. Sheik** (119 Ill. 579), 882.
- Wurtz v. Hart** (13 Iowa, 515), denied; **Matter of Bates** (118 Ill. 524), 336.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CROSS v. THE CITY OF KANSAS.

(90 Mo. 12.)

Municipal corporation — change of grade of street — damages — estoppel.

An owner of land who joins in a petition to the common council, asking for a change of grade of a street, is estopped from claiming damages on account of the grading, as asked for, upon the ground that the petition was not signed by the owners of a majority of the front of land on the part of the street improved.*

ACTION for damages by change of street grade. The opinion states the case. The defendant had judgment below.

Albert Young, for appellant.

Ed. L. Scarritt, for respondent.

NORTON, J. This is a suit to recover damages alleged in the petition to have been occasioned by cutting down, changing and lowering the grade of May street, in the city of Kansas, in pursuance of a certain ordinance of said city, whereby plaintiff's property abutting on said street is alleged to have been damaged.

The answer of defendant sets up in substance that May street was a public street of said city, with an established grade; that in 1882, plaintiff and other residents and owners of property between

* *Contra: Petition of Sharp* (56 N. Y. 257), 15 Am. Rep. 415.

Sixth and Ninth streets in said city petitioned the common council to grade a part of said May street, from Sixth to Ninth street, according to a grade specifically set forth in the petition; that the common council found that the work as named in said petition had been petitioned for and the petition published according to law; that in pursuance of said petition an ordinance was passed and the grade of the street lowered and changed as prayed for by the petitioners, of whom plaintiff was one; that he stood by and saw the work done according to his request, and that he is thereby estopped from setting up any claim for damages, if any resulted. The plaintiff admits that he joined with others in a petition to the common council asking for a change of grade in said May street, as alleged in defendant's answer; that said change of grade and improvement of said part of said May street was done under and by virtue of the ordinance of defendant aforesaid, passed in compliance with said alleged petition; that said improvement was done at the expense of the property holders owning the property fronting on said part of said street, and that the said common council did find and declare that the work as named in said pretended petition had been petitioned for and the petition published according to law. The replication then sets up that the petition was not signed by property holders owning a majority of the front feet of property owned by the residents of the city of Kansas, and fronting on the part of May street to be improved. Judgment was rendered for the defendant on the pleadings, from which the plaintiff has appealed.

But two questions are presented by the appeal. First, was plaintiff estopped, by reason of his being one of the petitioners, from claiming damages? Second, is so much of section 8, article 8, of the charter, as provides that, "if the common council shall, in the ordinance causing to be done the work petitioned for, find and declare that the work has been petitioned for, and the petition published according to law, such finding and declaration shall be conclusive for all purposes, and no special tax bills shall be invalid or be affected by any defect in, or objection to the petition." (*Sic.*)

It will be observed that this is not an action to recover damages occasioned by the negligent execution of the work in changing the grade of May street, but to recover damages resulting from grading said street at plaintiff's request, by petition in connection with others, and which grading was done in exact conformity with the request so made. Plaintiff now comes in, after full completion of

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the work, and admits that he petitioned for the work to be done just as it was done; that he stood by and saw it done without murmur or complaint, but says, notwithstanding said admission and acquiescence, he ought to be allowed to recover damages because a sufficient number of others did not sign the petition to authorize the city council to act in the matter.

We have been cited to some authorities which intimate that this can be done, but we are inclined to accept and apply to this case the doctrine as laid down in *Herman on Estoppel* (1st ed.), § 554, where it is said: "Where several tax payers petition the common council to cause certain improvements to be made, as grading, macadamizing, or paving streets, and the improvement or work is completed in compliance therewith, without complaint or objection on their part to the acts of the contractor or common council, in relation thereto, they are equitably estopped to deny that the common council had no constitutional power to do it. It would be the perpetration of a gross fraud after their willing and active assent; and when they impliedly assent that an assessment shall be made to pay for such improvements, whether the assessment is illegal or not." What is said in the case of *City of Burlington v. Gilbert*, 31 Iowa, 357 (s. c., 7 Am. Rep. 143, at p. 147), may appropriately be applied to the case in hand. There, as here, a petitioner claimed and sought exemption, from the fact that the petition to the city council had not been signed by a sufficient number, and in the disposition of the question it is said: "We are of opinion, after having thus signed and presented the petition to the city council, thereby inducing the city to enter upon the improvement requested in the petition, the defendant is estopped from objecting that his petition was not sufficiently signed. The defendant, by his acts, agreed and consented that the city should make the improvement designated in the petition, and assess his property with its due proportion of the cost, and he cannot be allowed to repudiate that agreement on the ground that other parties should have entered into the same agreement. While they may not be bound, he is."

Viewing the subject in the light of the above authorities, and giving efficacy to the principle which they announce, and applying the maxim, "*volenti non fit injuria*," it disposes of both the questions raised by the record, and leads to an affirmance of the judgment, and it is hereby affirmed.

All concur.

Judgment affirmed.

STATE V. SMITH.

(30 Mo. 37.)

Criminal law—trial—presence of defendant at impanelling of jury.

The presence of a prisoner indicted for felony is necessary at the impanelling of the trial jury, and he may not waive the privilege, and his absence is not cured by the subsequent offer of the court to allow him to examine the jurors at the time of making peremptory challenges.

THE opinion states the case.

George Robertson and Orlando Hitt, for appellant.

B. G. Boone, attorney-general, for State.

RAY, J. Defendant Ann Crocket was indicted at the June term, 1883, of the Andrain Circuit Court for arson, and the other defendants, Smith, Redman and Glover, were jointly indicted with her for inciting, etc., her to commit the offense. At said term the prosecuting attorney entered a *nolle* as to the defendant Ann Crocket. A severance was taken and a separate trial of the defendant Smith at the October term resulted in the failure of the jury to agree.

At said first trial defendant made affidavit against the sheriff and his deputy, charging them with prejudice against him, and the court thereupon appointed one Dobyms to summon the special venire, and said Dobyms acted in that behalf at the first trial of the cause. At the January term (when the second trial occurred and this conviction was obtained) said Dobyms declined to further act, and the court thereupon (against the objection of defendant) appointed one Joseph James, who was not the coroner of the county, to act in this behalf. Defendant renewed his said objection to the appointment of said James and his authority to summon the jury, by filing his motion to quash the panel, upon said ground, among others, that the court having found the sheriff disqualified to act in summoning the jury, by reason of prejudice against defendant, the coroner of said county was the only officer designated by the statute to act in this behalf in the place of said sheriff. R. S., 1879, §§ 3893, 4, 5. This motion was overruled and this action of the court is assigned and urged here as error.

[Omitting this consideration.]

Another error complained of is, that the defendant was not present in court, whilst the jury was being impanelled and examined as to their qualification to sit as jurors in the cause. The facts in this behalf, as the same appear in the record before us, are as follows: The defendant was not in court, except by his counsel, when the *venire facias* was issued, nor when it was returned by said James, nor when the jury was examined, on the *voir dire*, nor at any time during the proceedings in said cause, till the jury was called to try the same on the eighth day of February, 1884, at one o'clock P. M., which was four days after the *venire* was issued, and forty-eight hours after said jury was examined on the *voir dire*, but at the expiration of the forty-eight hours from the time the copy of the list of jurors was served on the defendant, and before the State or the defendant was required to make challenges. The said panel of jurors being present in court, and the defendant in person also being present, and his attorney also, the court then informed defendant and his counsel that they now had an opportunity to make such further examination of the jurors as they might deem proper, whereupon defendant's attorney said they would then demand an additional forty-eight hours before making their challenges, which the court refused to give, and defendant's counsel thereupon declined to make such further examination of the jurors. Before exercising his right of peremptory challenges defendant filed his motion to quash the panel upon said ground of his absence as aforesaid, which the court overruled and defendant excepted.

The question thus presented involves a construction, in connection with this state of facts, of section 1891, Revised Statutes, which provides that, "No person indicted for a felony can be tried unless he be personally present during the trial * * *"; and that in all cases the verdict of the jury may be received by the court and entered upon the records thereof in the absence of defendant, when such absence on his part is willful and voluntary * * * and that when the record in the Appellate Court shows that defendant was present at the commencement or any other stage of the trial, it shall be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial." At common law, if the accused was in such cases absent, either in person or by escape, there was by reason of his said absence, a want of jurisdiction over the person, and the court could not proceed with the trial or receive the verdict or give judgment. Cooley's

Const. Lim. 390. But under the statute, if the absence of the defendant is willful and voluntary, the court is authorized to receive and enter the verdict, and this is, by the express terms of the statute, the only action the court is authorized to take "during the trial" where the same is for a felony, unless the accused is "personally present." In other words the statute means, we think, that in all cases of felony, it is necessary that the defendant should be personally present in court at each and every material step taken during the trial up to the time when the verdict is to be received, when the particular steps mentioned in the statute, of receiving and entering the verdict, may be taken in his absence, if the same is willful and voluntary. Impanelling and examining the jury is, we think, manifestly a material, substantive and important step "during the trial," within the meaning of this section.

As was said in the case of *Hopt v. People*, 110 U. S. 574, which involves, we think, the same principle and question as the one at bar, "the prisoner is entitled to an impartial jury, composed of persons not disqualified by the statute, and his life and liberty may depend upon aid which by his presence he may give to counsel and to the court in the selection of jurors. The necessities of defense may not be met by the presence of his counsel only. For every purpose therefore involved in the requirement that the defendant shall be personally present when the indictment is for a felony, the trial commences at least from the time when the work of impanelling a jury begins."

In the case at bar the accused was out on bond and not in prison or custody, but this we think under the statute makes no difference, even if we must infer, as suggested by counsel, that his said absence was voluntary on his part. As already said, if his absence is willful and voluntary, the verdict may be received and entered of record, for the reason that these steps during the trial are expressly authorized by the statute, but the expression of authority therein to do these particular acts must be held to exclude all authority to take any other step "during the trial," unless the accused is personally present. This requirement of the statute is one he cannot waive. It is not made for his benefit only and his rights are not all that is involved or contemplated in said enactment. In the case already cited the court further says: "We are of opinion that it is not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial.

The argument to the contrary proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relation which the accused holds to the public, as of the end of human punishment. * * * The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods. * * * Such being the relation which the citizen holds to the public and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life is involved in a prosecution for felony, that he shall be personally present at the trial, that is at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." To the same effect is the line of cases to which we have been referred decided in the Supreme Court of Arkansas. See *Osborne v. State*, 24 Ark. 620; *Brown v. State*, 24 Ark. 620, and earlier cases in same court cited in cases just mentioned.

But it is contended for the State that this omission is cured by the subsequent offer of the trial court, when the case was called for the purpose of making peremptory challenges, and proceeding with the trial, to allow the accused to then examine the jury as to their qualifications, and that as he declined to do so at this time none of his substantial rights were affected prejudicially. But this view is, we think, not satisfactory for a variety of reasons. In the first place, examining the jurors, when the accused was not personally present, was not merely an irregularity in the mode and process of impaneling the jury, as to which a large discretion is allowed the trial court, and whose action it is said will not, as to such irregularities, be reviewed unless some actual prejudice to the defendant is made to appear, but on the contrary, the examination conducted in his absence, as we have seen, was a breach and infringement of the statute requiring the accused to be personally present at this step during the trial, and this in and of itself, and as a matter of law,

sufficiently shows the prejudice ; or in other words prejudice to the rights of the accused is under the circumstances presumed, without any showing in that behalf. The court, upon discovering the absence of the accused during said examination, doubtless thought it could give the defendant the full benefit of his substantial rights by permitting him to then and there examine the jurors as to their qualifications, without discharging the entire panel, or without allowing any further period of time, as demanded by defendant, before requiring the exercise by the parties of their peremptory challenges.

But the examination of jurors as to their qualifications as such does not, we think, consist altogether or exclusively in their examination in said respect by the accused, or his counsel, which is the extent of said offer so made by the court. Their examination by the prosecuting attorney, or by the court, or both, as to their qualification under the statute, and such further examination, if any, became necessary or proper in the examination of the case, as to other causes of disqualification than those mentioned in the statute, and such other examination made by the State's attorney, if any, with a view to the exercise of his peremptory challenges, all constitute a part, or may do so, of the examination and trial of the jurors in this behalf. The opportunities for observing the conduct and bearing and manner of the juror throughout the whole examination, as well that by the State as that on his own behalf, may be of great value to the accused. The accused has opportunities thus afforded for inquiry, and comparison and for inspection of the jurors personally as they thus undergo the examination as a whole. The practice at common law required the examination of the jurors singly, so that the accused should not be confused "by looking upon a multitude of faces at once," but might have opportunity to scan the countenance and observe the demeanor of each separately. But whether this practice prevails or not, it is the intention and aim of the law to provide liberal facilities and opportunities for securing a fair and impartial jury. Even if the time and facilities intended to be provided by the law for the selection of the jury were not in fact abridged by this action of the court, there had been an infringement of the statutory requirement that the accused should be personally present during the trial, for the jury had been in part examined touching their qualification during his absence. This was, we think, a ground of challenge to the array, and as the

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defendant was insisting upon his right under the statute to be personally present during this part of the trial, his said motion should have been sustained upon this ground.

For the reasons above stated, we are of opinion, that the trial court erred in overruling defendant's motions, above complained of, and for that reason its judgment is reversed and the cause remanded for further proceedings in conformity hereto.

Judgment reversed, and cause remanded.

All concur, except HENRY, C. J., not sitting.

ST. JOSEPH FIRE AND MARINE INSURANCE COMPANY V. LELAND.

(90 Mo. 177.)

Office and officer — action for refusal to perform ministerial duty — jurisdiction.

One may maintain, in Missouri, an action of damages against a county commissioner of Kansas for refusing to obey a *mandamus* to levy a tax to pay a judgment against the county.*

THE opinion states the case. The defendant had judgment below.

B. R. Vineyard, for appellant.

Green & Burnes, for respondent.

HENRY, C. J. This is an action to recover damages against defendant on the following alleged facts: That he is, and for six years last past has been, a member of the board of county commissioners of Doniphan county, Kansas, and chairman of said board, consisting of three members, whose duties are purely ministerial; that plaintiff, ever since defendant has been a member of said board, has owned and held a large number of bonds issued by said county in payment for stock subscribed by said county in the Denver City Railroad Company and the Atchison & Nebraska Railroad Company; that it has been the duty of said board of commissioners, under the laws of Kansas, to annually levy and cause to be collected on the property in said county, subject to taxation, a tax sufficient to meet and pay off the interest coupons of said bonds as they

* See note, 58 Am. Rep. 143.

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matured, without any discretion to refuse to do so; that defendant not only failed to discharge said duty, but conspired with the other members of said board and other citizens of said county to cheat and defraud plaintiff out of the interest accrued and to accrue on said bonds; and in furtherance of said conspiracy the defendant induced the said board to disregard its said duty, and for six years last past has prevented said board from levying and causing to be collected any tax or money to pay the interest on said bonds. Then follows an allegation that plaintiff had instituted suits on interest coupons in the Circuit Court of the United States for the district of Kansas against said board, and recovered judgments, one, 13th of June, 1879, for \$4,626 and \$200 costs of suit; one, 17th of June, 1881, for \$4,150.13 and \$200 costs, and another on the same day for \$4,429.48 and \$200 costs; that said court, by its peremptory writ of *mandamus*, commanded said board and each member thereof, to levy a tax on all property in said county subject to taxation, on the first Monday in August, 1882, for the purpose of paying said judgments, etc., but that defendant, for the purpose of carrying out said conspiracy, and in order to cheat and defraud plaintiff, refused to obey said *mandamus*, and induced the other members of the board to disobey said writ, although plaintiff was present by its attorney on said first Monday of August, 1882, at Troy, Doniphan county, Kansas, while said board was in session, to induce the board to discharge its duty, etc.; but defendant then and there, acting as chairman of said board and in furtherance of said conspiracy, refused to permit plaintiff to be heard, and notified plaintiff that said judgments should never be paid, wherefore plaintiff asks judgment against defendant for the amount of said judgments, etc.

A demurrer to this petition was sustained and a judgment rendered against plaintiff, from which this appeal is prosecuted. Is the action maintainable in this State? Appellant's counsel cite cases in other States similar to that of *Vawter v. Missouri Pacific Ry. Co.*, 84 Mo. 679; s. c., 54 Am. Rep. 105, in which the ruling was different from that of this court in that case, in which the railroad company was sued in Missouri by the administrator of one who was killed by a train of defendant's cars in the State of Kansas, and sought to be held liable here, under a statute of that State, materially different from ours, on the same subject. We held that this could not be done. The common law gave no such action.

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The right to recover was purely statutory, and in this State the action is not maintainable by the administrator.

The right of action against a ministerial officer for a violation or neglect of duty by one injured in consequence thereof is a different matter. The common law gave the party aggrieved an action against the officer in such case. There is authority for the broader position that, "wherever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." *Denick v. Railroad*, 103 U. S. 18. This doctrine has been announced in cases similar to that of *Vawter v. Railroad*, *supra*, by courts with which this court is not in harmony on the subject. *Ex parte Riper*, 20 Wend. 615, was a case in which in the State of New York an attachment proceeding was commenced against a party, a resident of New Jersey, on an indebtedness created by the law of the latter State. The defendant was a director of a bank in New Jersey, the charter of which made the directors, jointly and severally, liable individually to every creditor for the payment of any bills obligatory, or of credit, or notes that they, or any of them, might issue or circulate. It was objected "that the directors being corporators and not liable at common law, but the statute raising their liability, and in the same section giving a remedy, that alone must be pursued." But said the court, COWEN, J.: "The charter does not confine the creditor to any particular remedy. It raises in his favor a debt against an individual, and leaves his remedy to the general methods of the law." Again: "It raises a debt against him which may, in its own nature, be enforced wherever the debtor, or his property, can be found, according to the forms of law at the place where found."

In a more recent case, in the New York Court of Appeals, it was held that "when the wrong is committed in a foreign State or country, no action can be maintained here without proof of the existence of a similar statute in the place where the wrong was committed." *Leonard v. Columbia Steam Navigation Company*, 84 N. Y. 48; s. c., 38 Am. Rep. 491; *McDonald v. Mallory*, 77 N. Y. 547; s. c., 33 Am. Rep. 664. It seems now to be the settled doctrine in that State that if the statute of one State is of similar import and character with that of another, a right of action under the statute accruing in one of those States may be prosecuted in the other.

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The decision in *Vawter v. Railroad, supra*, was based upon the dissimilarity between the statute of Kansas and our statute on the same subject. But whether it is held that in that class of actions the courts of this State will afford redress or not, the case at bar stands upon a different principle. The plaintiff does not seek to enforce a purely statutory right, but his action is one maintainable at common law, and if he had a good cause of action in the State of Kansas, he may maintain it in the courts of this State. The petition alleges that the duties of defendants, under the laws of Kansas, were purely ministerial. Whether so or not raises an issue of fact, if denied. If his functions were judicial, the action is not maintainable unless the Kansas statute gives an action in such cases.

The statute of Kansas prescribing the place where suits should be commenced against public officers for acts done by them in virtue, or under color of their officers, or for a neglect of official duties, is operative in that State, but was not designed to affect the right of the party to his suit in another jurisdiction. It is merely a provision to the effect that if the suit is instituted in that State it must be brought in the county in that State where the cause of action arose.

We have statutes of a similar character prescribing where a party may be sued and in what court in this State, in causes of action which are transitory and upon which there is no question that the plaintiff could maintain an action in any other State of the Union. Nor is it a valid objection to the cause of action alleged in plaintiff's petition that it has already obtained a judgment against Doniphan county for the amount of the interest coupons due, and also a peremptory *mandamus* from the Circuit Court of the United States for the district of Kansas, commanding the board, of which defendant is a member, to levy a tax to pay the judgments; that the said court may proceed against defendant, as for contempt, and possibly succeed in compelling the levy of the tax does not deprive plaintiff of his right of action against the defendant. The law imperatively imposes duties upon ministerial officers. It is as much their duty to obey the law as the mandates of the courts; and that the courts have in vain adjudged and ordered the performance of a duty, is no bar to an action by the party aggrieved against the obstinate officer who refuses to obey both the law and the court.

The judgment is reversed and the cause remanded.

All concur.

Judgment reversed and cause remanded.

Reando v. Misplay.

REANDO V. MISPLAY.

(90 Mo. 251.)

Contract—implied—with insane person.

A daughter may recover, as upon an implied contract, for necessary services rendered by her to her insane mother with the intention for charging for them.*

ACTION for services. The opinion states the case. The plaintiff had judgment below.

Hough, Overall & Judson, for appellant.

Dinning & Byrns, for respondents.

NORTON, J. This is a suit by Catherine Reando, ~~nee~~ Catherine Boyer, and a daughter of Mary Boyer, against the administrator of the estate of said Mary Boyer, mother of said Catherine, to recover for "care, nursing and attention," alleged to have been rendered by her to her mother from October 1, 1872, to May 28, 1882. It appears from the testimony for the plaintiffs, as well as from the testimony for the defendant, that Mary Boyer, mother of the plaintiff Catherine, was insane during the whole of the period for which compensation is claimed, and that she died in May, 1882. The evidence of plaintiffs tended to show that the husband of Mary Boyer died in 1865, leaving a homestead on which she and plaintiff continued to reside till her death, during the whole of which period she was insane and required the care and attention of some one; that he also left a small amount of personal property, to-wit, one horse, two or three head of cattle, and \$75 in money, which the widow retained, and to which she was absolutely entitled under the law, it not appearing that there was any administration on the husband's estate. The evidence further tended to show that from 1865 to 1882, the plaintiff bestowed upon her mother all the care and attention she required, did the work about the house, sawed wood, rented out the cultivating part of the farm, did washing for some of the neighbors and received pay in provisions; that the care of her mother was worth \$100 a year with board.

* See *Hodge v. Powell*, *post*.

The evidence of defendant, while it established the fact of the insanity of Mrs. Boyer, also tended to establish the fact that her condition was such as to require the care of some one, and that such service could have been performed by a twelve or fifteen-year-old child; and that one Misplay, who had procured some pension money for Mrs. Boyer, furnished her with necessaries, but to what extent does not appear. Two of defendant's witnesses testified that plaintiff had told them that she did not intend to charge for her services, which was contradicted by the evidence of plaintiff. During the progress of the trial defendant offered in evidence an order of the County Court of Washington county, Missouri, which court then had jurisdiction over the property of insane persons, at its November term, 1869, appointing V. B. Misplay guardian of Mary Boyer, an insane person, and also the settlement of said Misplay as such guardian, for the purpose of showing that Mary Boyer had been cared for by her guardian; but the evidence was by the court excluded upon the ground that Mary Boyer had not been declared an insane person by a prior order of said court, and the court held that said order was not competent to go to the jury to affect the implied contract between plaintiff and her mother for compensation for her services, but it might go to the jury for the purpose of showing that Misplay had authority to, and did, furnish as *de facto* guardian, Mary Boyer with necessaries. This ruling of the court was excepted to, as well as the action of the court in giving the following instruction :

"Gentlemen of the jury, the court instructs you that where services are rendered and received, a contract of hiring, or obligation to pay, will be presumed, but a presumption may arise from the relationship of the parties, that the services rendered are acts of gratuitous kindness, and in this case it is a question for you, taking into consideration all the circumstances, including the nature and degree of the relationship of the parties and their circumstances in life, to determine whether there was any implied contract for compensation or not. Now if you find from the evidence in this cause, that plaintiff rendered services to the mother in taking care of her and waiting on her, and that she intended while rendering such services to charge the mother for the same, and that her mother was insane at the time, and that such services were necessary for the comfort and well-being of her mother, then you will find the issues for the plaintiff, and allow her in your verdict such sum

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as you may believe, from the evidence in the cause, she is entitled to, not exceeding the sum of \$1,000.

"If you find the issues for the plaintiff in ascertaining what compensation you shall allow her, you must confine yourself to the last ten years of Mary Boyer's life, and you must also take into consideration the situation of the parties, the property supplied by her and her mother, and the kind and nature of the services rendered."

"But on the contrary, if you believe and find from the evidence in this cause, that plaintiff rendered the services sued for as acts of gratuitous kindness to her mother, and as a member of the family, with no intention of charging her for the same, then you must find the issues for the defendant, and in such case it makes no difference how meritorious and valuable her services to her mother may have been."

It is insisted that the instruction of the court is erroneous, because it allows a recovery on an implied contract, and it is contended that an insane person cannot be bound on an implied contract. In support of this contention we have been cited to the case of *Halley v. Troester*, 72 Mo. 73. It is only held in that case that an insane person cannot bind himself by express contract; it does not go so far as to overthrow the rule that when necessities are furnished an insane person, the law will imply a contract to pay for them. The rule is thus stated by Phillips on Lunatics, 17: "The courts of law and equity imply a contract by one *non compos mentis* to pay for necessities supplied to him, but if he is already sufficiently supplied with any goods, it seems he is not liable for a further supply of such goods, although supplied without notice of the previous supply." The principle announced by this author is emphasized in the case of *Sawyer v. Lufkin*, 56 Me. 308, where it is said by APPLETON, C. J.: "This is an action for necessities furnished the defendant, an insane person over twenty-one years of age, and under guardianship. The guardian appears and contests the plaintiff's claim. If necessities are furnished a person in this condition, in good faith, and under circumstances justifying their being so furnished, the person furnishing may recover. If the law were not so, the insane might perish, if a guardian having means should neglect or refuse to furnish the supplies needed for their support. They stand in the same position as minors, and are liable for necessities. * * * Nor is this limited liability changed by a statute, which provides that 'when a person over twenty-one years of age is under

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guardianship, he shall be deemed incapable of disposing of his property, otherwise than by his last will, or of making any contract, notwithstanding the death, resignation or removal of the guardian.' This prohibits all express contracts by the insane. They cannot be liable on any express promise, but their estate may be held when the law implies one. * * * The estate of the insane is legally, as well as equitably, liable for necessities furnished in good faith and under circumstances justifying their being furnished."

The fact that plaintiff might have sued the guardian of Mrs. Boyer, if such guardian had been appointed as provided by statute, cannot affect plaintiff's right to sue her administrator, as such guardianship was terminated on the death of Mrs. Boyer. In this view of the subject we must uphold the ruling of the trial court in rejecting the order of the County Court offered in evidence. The judgment, we think, is for the right party, and finding no error in the record affecting the merits of the controversy, it is hereby affirmed.

All concur.

Judgment affirmed.

SCHMIDT V. KANSAS CITY DISTILLING COMPANY.

(90 Mo. 284.)

Negligence—dangerous premises—infant trespasser.

An action for the death of a child by falling into an unfenced pool of hot water discharged on the defendant's distillery premises, sixty feet from the highway, and two hundred and twenty-five feet from any house, may not be maintained without proof that the place was attractive to children, or that to the defendant's knowledge they resorted there for amusement. (*See note, p. 28.*)

ACTION for death of plaintiffs' child by negligence. The opinion states the case. The plaintiff had judgment below.

Gage, Ladd & Small, for appellant.

Wash. Adams, and *H. Stubenrauch*, for respondent.

HENRY, C. J. The plaintiffs are husband and wife and parents of a child three years old. Louisa, whose death occurred November 2, 1883, upon the premises of the defendant, and plaintiffs allege that it was caused by the negligence of the defendant.

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The petition is as follows: "Plaintiffs state that they are now, and were, at and prior to the date hereinafter mentioned, husband and wife and father and mother of Louisa Schmidt, their child, born on the 29th day of October, 1879. Said Louisa Schmidt was killed in the manner hereinafter stated, and at the time of her death was a minor and unmarried. That the defendant now is, and was, at and prior to the dates hereinafter mentioned, a business corporation, duly organized as such under and by virtue of the laws of the State of Missouri, and engaged in the business of buying and selling and refining grain, and for that purpose kept and still keeps and maintains distillery buildings, and in connection with said buildings, and in its business, defendant erected and maintained, and was, at the time hereinafter stated, using a large number of steam engines and boilers, to-wit, six, in the county of Jackson, and State of Missouri, east of and near the city of Kansas; that the defendant, on and prior to the 2d day of November, 1882, kept and maintained an escape pipe in connection with said boilers for the purpose of blowing off hot water, debris and steam from the same; said pipe extended from the distillery, where the boilers were, under and across a travelled public road and highway, and terminated above ground in an open space about sixty feet north of said travelled public road. Through this pipe defendant from time to time, as occasion required in its business, blew off and discharged hot and boiling water, debris and steam from said boilers; and said water, steam and debris were discharged and thrown upon open ground and about sixty feet north of said travelled public road, and in the neighborhood and vicinity of several inhabited dwelling-houses along said road. At the end and outlet of the pipe where the boiling water, debris and steam were blown off and discharged, there was no fence, guard, signal or protection of any kind, but the same was left exposed, open and unguarded.

"Plaintiffs say defendant wrongfully and negligently kept and maintained said pipe as aforesaid, and wrongfully and negligently left the end and outlet thereof contiguous to said public road unprotected, and in an exposed, open and dangerous condition, and wrongfully and negligently, while said pipe was so unprotected, discharged from time to time hot and boiling water, debris and steam through the same on to the open ground near said road and highway and dwelling-houses; that on the 2d day of November, 1883, while defendant so kept and maintained said pipe for the purposes and in

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the manner aforesaid, Louisa Schmidt, a child of plaintiffs, without fault of plaintiffs, went to the end and outlet of said pipe, near said road, and while there on the day aforesaid, the defendant suddenly, without having given any signal or warning of any kind, blew out hot and boiling water, debris and steam through said pipe left exposed as aforesaid, on to the ground and into a depression or hole thereon at the end of said pipe, and said child then and there being fell into said boiling water and the said debris, and the said Louisa Schmidt was thereby scalded and burned to death, and did from the effects thereof on the same day die.

"Plaintiffs say that the death of their said child was caused by the wrongful acts, neglects and defaults of defendant.

"By reason whereof plaintiffs are damaged in the sum of \$5,000, and an action hath accrued to them under and by virtue of the statute in such cases made and provided. Wherefore plaintiffs ask judgment for the sum of \$5,000 and for costs."

The evidence in the case tended to show that plaintiffs were husband and wife, and the lawful parents of Louisa Schmidt, the deceased. That said Louisa Schmidt, an infant and unmarried, three years and three days old, died on the 2d day of November, 1882, of the injuries received the same day and some three hours earlier on the defendant's premises. That the defendant was the owner and operator of a distillery east of and near the city of Kansas on the south side of the Missouri river; that the distillery buildings were situated on the south side of a public road forty feet wide, which runs north-east and nearly parallel to a slough, which was formerly a main channel of the river but which has recently been to a great extent filled up, and that across the slough and between it and the river proper, are situated the cattle-sheds of the defendant, which owns the property from the public road to the river, which is about one thousand feet north of the road. Along its western boundary a causeway or private road of defendant extends across the slough to its cattle-sheds. Along its eastern line, from the island across the slough to the public road, the defendant had a fence, which was also extended up to the public road, to the west or south-west until it joined some buildings, which continue the fence up to within some seventy-five or eighty feet of the corner of the public road and the causeway aforesaid, and for this distance along the public road, and also along the causeway, there was no fence or other erection to prevent people from entering the grounds of the defendant between

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the public road and the slough. This public road was considerably travelled by the neighbors, the gardeners, and others living down the river, and the distillery employees. The slough was filled with water which rose and fell with the river, and was a muddy, filthy place, owing to the discharge of waste and offal into it from the distillery and the cattle-barns. Upon this open space, between the road and the slough, there were three large cottonwood trees. The ground was rough and somewhat broken, but at this time was dry and passable, firm and not muddy. A twelve-inch sewer pipe passed from the distillery under the public road, and came out and discharged upon this lot some forty feet or more north of the public road, and a few feet east of the causeway. This pipe conveyed refuse matter, swill and water, which wore a channel from the mouth of the sewer some two feet or more deep, down to the mouth of the slough. The escape-pipe, a small iron pipe from the boilers of the distillery, of which there were six, was passed under the public road and came out some fifteen or eighteen feet north and east of the mouth of the sewer-pipe. It came out of the ground about half way down the bank of the slough, which was the old river bank, and was three or four feet high. It had been a higher bank, but the deposits of sand had filled the slough up so that it sloped toward the slough. This pipe protruded from the bank some eighteen inches, and was held in place by a stone placed under it in the bank. It was used for blowing out the boilers, and discharged steam, hot or boiling water and mud, and was used whenever it was necessary to blow out the boilers—once a day, or oftener if required. The pipe was some two feet above the level of the slough water at the time, and from six to fifteen feet from the water. In front of the pipe, the water discharged from it had worn a hole fifteen or eighteen inches wide and twelve or fifteen inches deep. This steam-pipe was about ten feet from these cottonwood trees, and at its mouth the ground was firm. Children played around the houses, and there were quite a number in the neighborhood. In the water in this hole, lying crosswise of it, the head and feet out, and her body in the water, the child Louisa was found. The water was hot. She was scalded and died some three hours afterward in consequence of the scalding. The plaintiffs reside some two hundred and fifty feet west of the pipe, in a house fronting on the public road. A short time before she was found she had asked permission of her mother to go over to Behren's

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house, which was adjoining that of Schmidt's on the east. She had gone to Behren's, and had gone in company with Behren's children, a girl eight years old and a boy four years old, who went to get water in a little tin bucket from the sewer. The Behren girl got her water from the sewer, and had turned to go home when she heard a scream, and going back, found Louisa fallen into the water in the hole in front of the escape-pipe. Louisa had not been gone from home more than ten minutes until the accident happened. The house of Behren was two hundred and twenty-three feet west of the pipe, the Schmidt's next beyond, and still further on were two or three other houses in which families with their children resided, and also a drug store. There was no fence to keep people from going on the ground; but there was a notice on a board upon one of the cottonwood trees, forbidding trespassers. The said Louisa was a bright, intelligent girl, three years and three days old. The plaintiff, John G. Schmidt, was at the time a laborer; had formerly been in the defendant's employ, and was by trade a stone-cutter. The plaintiff John G. Schmidt is now thirty-five years of age, and plaintiff Anna, his wife, is twenty-three years old. Plaintiff John G. Schmidt employed a physician to attend the deceased when injured, and paid the expenses, and also her funeral expenses. Plaintiffs were in the habit of exercising good care over their child, and had once warned her not to go to the defendant's waste-pipe. Defendant could have put up a fence inclosing the pipes without difficulty. The hog-pen shown on the map was not built at the time of the accident, but afterward. One witness, Mrs. Gluck, testified that she had a clothes-line between the end of the escape-pipe and the slough, and she also testified that her clothes-line was east of the escape-pipe. Annie Ernst, who worked for the Behrens, testified that she had herself gone to the waste-pipe for water; and men who worked at defendant's cattle-sheds were in the habit of washing the filth from their boots at the end of the waste-pipe. Witness Fluellen saw a couple of the Behren children getting water from the waste-pipe before the accident. And this was all the evidence.

Plaintiffs obtained a judgment for \$5,000, from which defendant appealed. We will not notice any of the instructions, given or refused, except the first of defendant's refused instructions, which declared that: "Upon the pleadings and evidence in the case, the plaintiffs are not entitled to recover, and the jury will find their verdict for defendant."

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Waiving for the present a consideration of the question relative to the sufficiency of the petition, and conceding for the argument that it states a cause of action, did the evidence establish such a state of facts as renders defendant liable?

It is a well-established general proposition of law, that the owner of property is under no obligation to keep it in a condition which will insure the safety of persons who go upon it without his license or invitation. *Hughes v. Railroad*, 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 596; the case of *Nagel v. Railroad*, 75 Mo. 653, belongs to a class of cases which qualify the general doctrine, and hold that where the owner permits upon his premises dangerous machinery, or other dangerous things likely to attract children, and does not guard it to prevent injury to them, he is liable for any injury they may sustain, in consequence of his neglect to place guards about it. The evidence in this case does not show that the escape-pipe, at its outlet on the defendant's premises, or the place into which it discharged the boiling water, was attractive to children. It was a dirty, filthy place, forty feet or more north of the public road. The house of Behren is 233 feet west of the pipe, and Schmidt's next beyond, and these were the nearest residences to the escape-pipe. There is no evidence that children were in the habit of resorting to this place for amusement or otherwise. There is nothing to show that the Behren children, with whom Louisa Schmidt went there, were ever there but once before, or that any other children were ever at that place. There was a notice on a board, nailed to a cottonwood tree on defendant's premises, forbidding people going upon the ground. It is not even shown that defendant knew that the water discharged from the waste-pipe had made the hole in the ground into which Louisa fell, and there is not a particle of evidence of negligence on the part of defendant, unless it be negligence to have used its property for its convenience, in a manner which might occasion injury to a trespasser upon its premises.

An owner of property cannot place temptations upon it, to allure any one to a dangerous place upon its premises, and escape liability for injury, that even a trespasser may sustain, in yielding to the temptation to go there. Nor can he place dangerous, unguarded machinery, or other dangerous things, so near a public street or highway, as to endanger persons thereon, without liability for damages to one occasioned thereby; but to assert a proposition stronger than these, against the owner of property, were to deny his

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dominion over it and compel him to use it not for his own but for the public convenience. The petition should have averred, either that the place where Louisa lost her life was attractive to children, by reason of the escape-pipe discharging the boiling water there, or that children in the neighborhood were in the habit of resorting there to play, or to witness the escape of the water and steam from the pipe. Some fact should have been stated, to show that defendant was not properly exercising its dominion over its own property. The judgment, with the concurrence of all the judges, is reversed.

ON RE-HEARING.

HENRY, C. J. Counsel for respondents are in error in their suggestion, that we overlooked some of the facts in the case, or the instructions asked by defendant, submitting to the jury the question of the attractiveness of the escape-pipes, etc., to children. The bill of exceptions, so far as relates to the testimony, was literally embodied in the opinion, and upon the facts which the evidence tended to prove, this court unanimously held that a demurrer to the evidence should have been sustained.

This was the principal and only ground upon which the reversal was based; but we still think, as was said in the opinion that: "The petition should have averred, that the place where Louisa lost her life was attractive to children, by reason of the escape-pipe discharging boiling water there, or that children in the neighborhood were in the habit of resorting there to play, or to witness the escape of the water and steam from the pipe. Some fact should have been stated, to show that defendant was not properly exercising its dominion over its own property."

Could any court on the facts alleged in the petition, disregarding the general allegation of negligence, say that the defendant was improperly using its property? That the escape-pipe was *per se* a nuisance, or that discharging the boiling water upon defendant's own premises, sixty feet from the highway, "in the neighborhood and vicinity of several inhabited dwelling-houses along said road," was an attractive and dangerous place to children? "Neighborhood" and "vicinity" are not terms which express any definite idea of distance. A few feet, or several hundred yards, or even a greater distance from the escape-pipe, would have been in its "vicinity" or "neighborhood." But the case made by the testimony was, if possible, weaker for plaintiffs than that alleged in the

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petition. The nearest inhabited dwelling-house, the evidence shows, was seventy-five yards from the point where the escape-pipe discharged the steam and boiling water upon defendant's premises. If there had been any evidence, which would have warranted a verdict for plaintiffs, the defendant's instruction given might have cured the defect in the petition. The judgment was not reversed for the fault in the petition. But as plaintiffs, on an amended petition alleging facts which show that the place where the child lost her life was attractive to children, or that to the knowledge of defendant, children were in the habit of resorting to it for amusement or otherwise, might establish a liability on the part of the defendant, we will modify the judgment by remanding it for another trial.

All concur.

Case remanded.

NOTE BY THE REPORTER.—In *Frost v. Eastern Railroad Co.*, New Hampshire Supreme Court, March 11, 1887, the ground of the action was that the defendant was guilty of negligence in maintaining a turn-table insecurely guarded, which being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turn-table by the noise of the older and larger boys turning and playing upon it. The turn-table was situated on the defendant's land, about sixty feet from the public street, and in a cut with high, steep embankments on each side, and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever to which was attached a switch padlock, which being locked, prevented the lever from being used unless the staple was drawn. At the time of the accident the turn-table was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle, and not locked with the padlock, the turn-table could not be set in motion by boys of the age and strength of the plaintiff. Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turn-table, and it is not claimed that the defendant was guilty of any active misconduct toward the plaintiff. The right of a land-owner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan v. Whidden*, 143 Mass. 287), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury the plaintiff was using the defendant's premises as a play-ground without right. The turn-table was required in operating the defendant's railroad. It was located on its own land, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich v. Wright*, 53 N. H.

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404; s. c., 16 Am. Rep. 839. Under these circumstances the defendant owed no duty to the plaintiff, and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfill. A land-owner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury result'ing from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Clark v. Manchester*, 62 N. H.—; *State v. Railroad*, 52 N. H. 528; *Sweeney v. Railroad*, 10 Allen, 868; s. c., 87 Am. Dec. 644; *Morrissey v. Railroad*, 126 Mass. 377; s. c., 80 Am. Rep. 686; *Sewery v. Nickerson*, 120 Mass. 306; s. c., 21 Am. Rep. 514; *Morgan v. Hollowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127; s. c., 21 Am. Rep. 120; *McAlpin v. Powell*, 70 N. Y. 126; s. c., 26 Am. Rep. 555; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76; *Gavin v. City of Chicago*, 97 Ill. 66; s. c., 37 Am. Rep. 99; *Wood v. School District*, 44 Iowa, 27; *Gramlich v. Wurst*, 86 Penn. St. 74; s. c., 37 Am. Rep. 684; *Cauley v. Pittsburgh, J. & St. L. R. Co.*, 95 Penn. St. 398; s. c., 40 Am. Rep. 664; *Gillespie v. McGowan*, 100 Penn. St. 144; s. c., 45 Am. Rep. 365; *Mangan v. Atterton*, L. R., 1 Exch. 289. The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it. *Knight v. Abort*, 6 Penn. St. 472; s. c., 47 Am. Dec. 478. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it. We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. 'The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect, children, women and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike.' *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461."

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See notes, 40 Am. Rep. 667; 88 Am. Rep. 73; 81 Am. Rep. 206; *Messenger v. Dennie*, 187 Mass. 197; s. c., 50 Am. Rep. 295.

In an action by a child six years of age for damages for injuries caused by defendant's negligence, the declaration alleged that the damage was caused by the negligent excavation of a hill by the defendant, and the leaving such excavation unfenced; also by defendant's negligently throwing the earth so excavated in plaintiff's lot, by means whereof he was enabled and invited to escape from his inclosure, and to follow a path which defendant had made leading up to the dangerous excavation. *Held*, that such declaration was not demurrable on the ground that plaintiff was a trespasser, and that being such a trespasser, the defendant owed him no duty; but the admission of the deposit of the soil in plaintiff's lot presented a question of its enticing effect on the child, which should go to the jury, and for failure to guard against which the defendant might be held liable, whether the child was a trespasser or not. *Mackey v. Mayor, etc.*, Miss. Sup. Ct., May 16, 1887. The court said: "If the plaintiff had entered upon the land of the defendant, and done injury there, for such injury he would have been responsible notwithstanding his tender years; but it is a totally different thing to say that negligence may be imputed to him. A lunatic or a cow may trespass, but negligence, which is a want of reasonable care, cannot be predicated of a creature devoid of reason and governed wholly by its instincts. If the defendant, by the exercise of reasonable forethought, should have anticipated the probability of the child's action, it should have guarded against the danger by removing the earth or obstructing the pathway. If it failed to do so, it failed in a duty which rested upon it, and is not relieved from responsibility even though the child was a trespasser in going upon the premises."

In *Kitz v. Nieman*, Wisconsin Supreme Court, March 1, 1887, it was held that the owner of a vacant lot in a city is under no legal obligation to fence in a hole or a pond on said lot on which surface water collects, and is not liable for the death of a child falling into it while at play on the lot. The court cited *Hargreaves v. Deacon*, 25 Mich. 1, and *Gramlich v. Wurst*, 86 Penn. St. 74; s. c., 27 Am. Rep. 684, and distinguished *Hydraulic Works v. Orr*, 83 Penn. St. 333, and *Kerr v. Forgue*, 54 Ill. 432; s. c., 5 Am. Rep. 146.

In *Galligan v. Metacomet Manfg. Co.*, Massachusetts Supreme Judicial Court, Feb. 28, 1887, the plaintiff, a child seven years old, while at play, fell down a precipitous place in a vacant lot in the rear of her house, and separated therefrom by a picket fence with a gate, built by defendants' workmen some years previous. There was no evidence that defendant owned or occupied the lot, or used the road through the gate, or had any right to build a fence along the edge of the precipice, or that it ever invited plaintiff upon the premises. It merely suffered children to play on the lot. *Held*, that she could not recover. "Merely abstaining from driving the children off is not an invitation which would impose any duty or responsibility for the use of the lot."

In an action to recover for personal injuries to plaintiff's intestate by the defendants' negligence, the intestate, a young boy, was standing on the sidewalk in front of a building in process of construction by the defendants, in conversation with a companion in the cellar of the building, and holding in

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one hand a rope running over a wheel, and used for hoisting purposes, and was injured by the starting of the apparatus, which drew his hand over the wheel and crushed it. The defendants were authorized to erect barriers, and exclude the public from that part of the street where the intestate was standing, but the evidence was conflicting whether the barrier was in fact erected. and as to the exact situation and condition of the wheel and rope referred to. Children were in the habit of playing about the premises, but against the protests of the defendants, and the intestate had been warned away. *Held*, a question for the jury. *Moynihan v. Whidden*, 148 Mass. 287.

In *Harriman v. Pittsburgh, C. & St. L. R. Co.*, Ohio Sup. Ct., March 22, 1887, the court cited *Powers v. Harlow*, 53 Mich. 507; s. c., 51 Am. Rep. 154, and continued: "The remarks of Judge COOLEY apply in all their breadth and force to this case. If it be said that *Powers v. Harlow* falls within that class of cases in which an invitation to go upon the premises was implied from the fact that there was an allurements or inducement to do so by reason of the attraction they afforded, the same may with equal, if not greater propriety, be said in this case, if the averments of plaintiff's amended petition be accepted. The railroad track of the defendant, so open and exposed as to be subject to the habitual and daily use of the public, including children, to the knowledge of the defendant, and with its permission, was quite as inviting to children, and likely to tempt them to wander and play upon it, as a partly inclosed shed; and a torpedo lying exposed upon the track is no less attractive to them than one in a partially covered box.

"It will be found by an examination of the cases in which consideration is given this subject, that there is in reality no invitation; and it is implied from slight circumstances, and generally from the fact that children following their inclinations go upon and into exposed and frequented objects and places. In certain cases, known as 'turn-table cases,' arising where railroad companies had left, on uninclosed grounds, turn-tables unlocked or otherwise unsecured against being revolved, and children wandered on to them, and were injured, it is said the children had an implied invitation to go upon them, because their being attracted to them might have been reasonably expected.

"In *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; s. c., 18 Am. Rep. 393, the syllabus is: 'A railway turn-table, which was attractive, but dangerous to children, was left exposed and unfastened in a public place, and many children were in the habit of going there to play. *Held*, that the railway company was liable for injury done by the turn-table while being moved by other children, to a child seven years old; and the fact that the child was a trespasser did not relieve such company.' To the same effect is *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; s. c., 32 Am. Rep. 418; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, and many other cases.

"Indeed the 'invitation' is implied from user alone. Thus in *Graves v. Thomas*, 95 Ind. 361; s. c., 48 Am. Rep. 727, it is held that where the owner of a city lot has for years suffered the public to cross it on foot, it is his duty, on making an excavation in the path for a building, to place a guard or warning; and he is liable to one who in endeavoring to pass is injured by reason of the absence thereof.

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"And in *Campbell v. Boyd*, 88 N. C. 129; s. c., 43 Am. Rep. 740, the court says: 'It (the way) has in fact been thus used, and known to the defendant to be thus used, with his acquiescence; and under these circumstances, it may be assumed to be an invitation to all who have occasion thus to use it.'

"And the observations of the court in *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646; s. c., 46 Am. Rep. 657, are pertinent also to the subject: 'In a case like the present, where the company knew that its right of way was constantly used, with its acquiescence, by the public as a footway, its servants are charged with notice that it will be so used; and they cannot, without fault, proceed in a manner which must necessarily be dangerous to the persons so using the same. After permitting the public to use its road, they cannot run their road without regard to the fact that the public are so using it.'

"The decision in *Corby v. Hill*, 4 C. B. (N. S.) 556, is said to be placed upon the ground of an implied invitation. And it is noteworthy that WILLES, J., suggesting the necessary averments in a declaration in such cases, wholly omits any mention of an invitation, implied or otherwise. The facts essential to a good declaration he says, are 'that the plaintiff had license to go on the (private) road; that he was in consequence accustomed to, and likely to pass along it; that the defendant knew of that custom and probability; that the defendant negligently placed slates in such manner as to be likely to prove dangerous to persons riding along the road and that plaintiff drove along the road and was injured.'

"In the late case of *Heaven v. Pender*, 11 Q. B. Div. 508, it is said that a more accurate and satisfactory ground of recovery, embracing all cases of implied invitation, is to be found in the proposition that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary prudence would recognize, that if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he might cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

"However this may be, the phrase 'implied invitation,' in its real value and significance as derived from its application in the adjudged cases, imports knowledge by the defendant of the probable use by the plaintiff of the defendant's property, so situated and conditioned as to be open to, and likely to be subjected to such use; and it may be concluded that while mere permission is not invitation, it may be implied from acquiescence by the owner in the accustomed use of his property by the public, so long in the same condition that it might reasonably be expected such use would be allowed by him to continue; or when he knowingly so exposes and leaves it to the use of children, without objection, that they, following their natural impulses, would be likely to go upon it; and in either case it is his duty to use such care commensurate with the danger arising from such use, as an ordinary prudent person would under the circumstances. Hence where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road, at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof; and is bound to exer-

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cise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road; and it is negligence for the servants of such company to knowingly interpose any new danger without reasonable precaution against injury therefrom.

"It is therefore unimportant whether the defendant's liability, so far as this question of negligence is concerned, be placed upon the ground of implied invitation, or be referred to that other (and as is said more satisfactory and accurate) statement of the rule announced in *Heaven v. Pender, supra*. Tested by either, the defendant, knowing of the probable use of its roadway by children, from the previous habitual use thereof by the public, long acquiesced in by the defendant, ought reasonably to have anticipated such use by the plaintiff and other children; and its servants, in placing and leaving the unexploded torpedo, an innocent looking, but highly dangerous and destructive article, where they might reasonably anticipate plaintiff and other children would be likely to go and handle it and be injured, thus placing a new and hidden danger in their way, without notice or warning, failed to use such care as a person of ordinary prudence would and ought under the circumstances."

BROWN V. CITY OF CAPE GIRARDEAU.

(90 Mo. 377.)

Municipal corporation — malicious prosecution.

A municipal corporation is not liable for a mere malicious prosecution.

ACTION for malicious prosecution. The opinion states the case. The defendant had judgment below.

Lewis Brown, for plaintiff in error.

W. D. Penny and *J. B. Dennis*, for defendant in error.

RAY, J. The first count of the petition in this case is as follows: Plaintiffs state that they are now, and for more than fifteen years last past have been husband and wife. Plaintiffs state that defendant willfully, maliciously and without probable cause, instituted and caused to be instituted against these plaintiffs, a certain groundless, false, malicious and vexatious suit in this court, on or about the 9th day of April, 1879, for certain taxes alleged to be due and owing by this plaintiff, Theodocia Brown; that said suit was made returnable to the May term, 1879, of this court; and by the statutes in such cases made and provided, said suit was triable at said

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May term, 1879; nevertheless plaintiffs state that said action was never brought to a hearing by this defendant, although solicited, demanded and requested so to do; that thereafter the said city of Cape Girardeau, on to-wit, January 30, 1884, in term time of said court, did voluntarily dismiss the same, and so said cause of action had wholly ceased, and been determined as aforesaid; that by reason of said false, malicious and groundless suit, as aforesaid, plaintiff, Theodocia Brown, hath been put to great trouble, annoyance and the employment of an attorney, to a damage in a great sum, to-wit, the sum of \$500, for which she demands judgment.

The second count is for damages for the institution of another suit for taxes in the following July, and its allegations are in all respects similar.

The answer of defendant was a general denial. The cause coming on for trial, defendant objected to the introduction of any evidence, upon the grounds that the petition did not state facts sufficient to constitute a cause of action, and because a municipal corporation is not liable in damages for the malicious prosecution of civil actions, which objections were sustained, and plaintiffs excepted. This ruling of the court is the only error complained of and the only question now before us.

As between mere private parties, actions may be maintained for the malicious institution, without probable cause, of a civil suit, but even as between these the authorities are not uniform as to what cases are embraced within the rule. Such cases as those for the malicious institution of suits in bankruptcy, or by attachments of the property, or proceedings to declare a person insane, or civil suits maliciously begun by the arrest of the party, are perhaps generally recognized within the rule. A class of cases, of which *Clossan v. Staples*, 42 Vt. 209, is perhaps the leading one, holds that where a civil suit is commenced and prosecuted maliciously without probable cause, and is terminated in favor of the defendant, the plaintiff is liable for the damages sustained in defending at least such damages as are in excess of the taxable costs. In *Mayor v. Walter*, 64 Penn. St. 283, SHARSWOOD, J., speaking for the court, observes: "If the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action may be, as plaintiff, in consideration of law, is punished by the payment of costs." The English cases, observes Cooley, in his work on Torts, support the view entertained by the Pennsylvania case. He also

makes the comment in the text, "that if every suit may be re-tried on an allegation of malice, the evils would be intolerable, and the malice in each subsequent suit would be likely greater than in the first." Cooley Torts, 189.

We have not been furnished, in the brief of counsel, with a citation to any authority, if such exists, in which this rule has been extended so as to expressly embrace the case of liability of a municipal corporation for the malicious prosecution of a civil suit. The liability of such corporations for torts, in some instances, is now well settled, and has been recognized by this court. Among others, is the case of *Worley v. Inhabitants of Columbia*, 88 Mo. 110, in which the facts were that plaintiff had been arrested and imprisoned, by the town authorities, under a void ordinance. This court then said: "It is the rule in this State, in this class of cases, that the corporation is liable for the act of its agents, injurious to others when the act is in its nature lawful and authorized, but done in an unlawful manner, or unauthorized place, but is not liable for injurious and tortious acts, which are, in their nature, unlawful or prohibited." The case contains an extended discussion of the general question, and a review of the cases upon the subject, and in its principle and analogies is, we think, conclusive of the case now before us. The right of the corporation to sue for, and to collect taxes would depend upon its authority, under the statutes, or grant of power by the State, to levy and impose the same. As to this, municipal corporations exercise governmental powers, conferred upon them by law, within prescribed limits, for local convenience, and for the public good.

The petition in the case contains no statement of facts sufficient to enable us to determine whether or not the corporation had, or had not, the authority to levy and impose, and to collect, the taxes involved in said suits. It does not appear what said taxes were for, or when, or how, imposed. If the taxes were valid, and it had authority, under the law, or its powers and valid ordinances, to impose them, and authority to collect the same, its motives are irrelevant and immaterial. The motives of the constituted and authorized law makers are such only as appear on the face of their enactments, and are not otherwise judicially subject to examination. *Mayor v. Randolph*, 4 Watts & Serg. 514. As to such persons, it may be that the absence of all authority is the equivalent of the want of probable cause in the ordinary action. In any event, the

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facts, and not the conclusion of the pleader upon the facts, should be averred, to show the want of authority, or want of probable cause. Such is the rule of pleading in the ordinary action for malicious prosecution. In the present case, the petition is fatally defective, for want of a sufficient statement of facts. And the action of the court, in sustaining the demurrer, is therefore approved, and its judgment in the cause affirmed.

All concur.

Judgment affirmed.

STATE V. PARTLOW.

(99 Mo. 608.)

Criminal law — homicide — perfect and imperfect right of self-defense.

Where one assails another, intending only an assault and battery, and the assailed resists with violence, and the assailant kills him in self-defense, it is only manslaughter; and if intending to abandon the combat, he retreats as far as he can, and is murderously pursued by the assailed and kills him in self-defense, it is justifiable.

CONVICTION of murder. The opinion states the case

T. W. Hart and D. D. Burnes, for appellant.

B. G. Boone, attorney-general, for State.

SHERWOOD, J. The defendant was indicted for the murder of William J. Taylor, by shooting him with a pistol, and being brought to trial was convicted of the second degree of that crime and sentenced to imprisonment in the penitentiary for ten years. As is usual in such cases there was a great deal of conflict in the testimony, the State making out a case which indicated that a felonious purpose actuated the defendant in visiting the house of Taylor on the day of the homicide, while the testimony on behalf of the defendant, and it would seem the weight of the testimony in the case, favored the theory that he went to Taylor's house with no other end in view but that of escorting his wife home, who was then at Taylor's attending the wedding ceremony between Willis Bunch and Mary Reno. Against the life of Bunch it appears that threats had been made by defendant some two years before, and at frequent intervals since almost down to the time of the homicide, which oc-

curring the 25th day of December, 1884, and within about ten days prior to that time.

I. The instructions of the court in regard to murder in the first and second degrees were in the usual form; and the jury were in effect instructed, that under the evidence and law of the case, unless they could find the defendant guilty of murder in the first or in the second degree, to acquit him altogether. The eleventh instruction, given at the instance of the State, was as follows: "Before the right of self-defense can avail the defendant in this case the jury must believe from the evidence, not only that the defendant had at the time he shot the deceased, reasonable cause to apprehend a design on the part of the deceased or others acting in concert with him, if they find others were so acting, to do him some great bodily injury, and that he had reasonable cause to apprehend immediate danger of such design being accomplished, and that he shot deceased to avert such apprehended danger, but they must also believe from the evidence that the defendant neither sought, invited, provoked nor commenced, by any willful act of his own, said difficulty. And if the jury believe from the evidence that there was an affray or difficulty between defendant and deceased, and that defendant voluntarily sought or invited the difficulty, or provoked or commenced it, or brought it on by any willful act of his own, or that he voluntarily and of his own free will engaged in it, then and in that case the jury is not authorized to acquit him upon the ground of self-defense, and this is true no matter how violent his passion became, or how hard he was pressed, or how imminent his peril may have become during said difficulty."

The phraseology of this instruction as to the defendant seeking or bringing on the difficulty is also used in instruction numbered two, given by the court of its own motion, and also in instruction numbered seven, given at the instance of the State. The defendant saved exceptions to the refusal of three instructions asked by him as follows:

"1. The court declares the law to be, that homicide is justifiable whenever there is reasonable cause to apprehend immediate danger of any felonious maiming, wounding or disfiguring being committed upon the person committing such homicide, when the same is done to prevent the execution of such felonious maiming, wounding or disfiguring, provided at the time the deceased or those aiding, abetting and assisting him, made or were about to make

such demonstrations as would induce a reasonable man to believe such danger was imminent.

"2. The court instructs the jury that even if defendant did voluntarily enter into a difficulty with deceased, still if the jury believe from the evidence, that after said difficulty had commenced, the defendant attempted in good faith to withdraw from the difficulty, but was prevented from so doing by the deceased, then in that event, defendant would be excused in taking the life of said Taylor, if it became necessary to do so in order to save his own.

"3. Before the jury can refuse to allow the defendant the benefit of the plea of self-defense, on the ground that he sought or voluntarily entered into a fight with deceased, they must believe from the evidence that defendant, at the time he sought, or voluntarily entered into a fight with deceased, was actuated by a felonious intent to maim, wound, hurt or kill said deceased."

As to the first of the instructions just mentioned, no error occurred in its refusal, because aside from any other consideration, the principle embraced in it had already been fully and more properly stated in instructions numbered one, six and seven, given by the court of its own motion.

I cannot speak so favorably of the refusal of defendant's third instruction, and there are many reasons for this assertion : Although evidence on behalf of the State disclosed the existence of certain matters, which if believed by the jury to be true, would perhaps have warranted the jury in finding the defendant guilty of the highest grade of homicide, yet that on behalf of the defendant disclosed such matters as would well have warranted the jury in acquitting the defendant altogether, or in finding him only guilty of manslaughter. In *State v. Hays*, 23 Mo. 287, the evidence disclosed a state of facts well covered by the third and sixth instructions there given at the instance of the State : " If the defendant, with a spade in his hand, took a position near Brown and gradually approached him and pushed him, for the purpose of inducing an altercation and getting a chance to kill him and commenced raising his spade at the same time Brown commenced drawing his pistol, and then struck him and killed him, he is guilty of murder in the first degree ; and in such case it would be no defense even if the evidence showed that Brown drew his pistol before the defendant commenced raising his spade ; for the law will not permit a man thus to induce a provocation, and so take advantage of it." " Although the jury may believe

from the evidence that Brown was attempting to draw his pistol, or had it drawn at the time Hays struck, and that Hays' life or person was in imminent danger, yet if they further believe that Hays intentionally brought on the difficulty for the purpose of killing Brown, he is still guilty of murder in the first degree." That case is a clear enunciation of the law as applicable to the state of facts disclosed by that record, a record abounding in all the incidents of murder in the first degree, prior expressions of ill-will, and murderous threats, followed up on the fatal occasion by Hays "inching up towards" his victim with a spade in his hands, with which he carried out his deadly purpose.

The principle thus announced in that case was followed in that of *State v. Starr*, 38 Mo. 270, for there a qualifying instruction, given by the court of its own motion, was expressly approved, which told the jury that: "The foregoing instructions are given with this qualification, that the right of self-defense which justifies homicide does not imply the right of attack; and the plea of justification in self-defense cannot avail in any case where it appears that the difficulty was sought for and induced by the act of the party in order to afford him a pretense for wreaking his malice," WAGNER, J., remarking: "The qualification was necessary in view of the evidence in the case. The testimony tended to show that the accused sought the altercation, and was instrumental in bringing it on; and if the jury found such to be the fact, the law would not permit him to shield himself behind the doctrine of self-defense. Besides the qualification is couched in the very language of Wharton, and commends itself for its justice, and is well supported by authority. Whart. Hom. 197."

The author just cited with approval, when speaking of a case "where the attack is sought by the party killing," uses this language: "The plea of provocation will not avail in any case where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretense for wreaking his malice; and it will presently be seen that even where there may have been previous struggling or blows, such plea cannot be admitted where there is evidence of express malice, and it must appear therefore that when he did the act, he acted upon such provocation, and not upon any old grudge." Whart. Hom. 197. And the same learned author uses similar language in another work. 1 Whart. Crim. Law (8th ed.), §§ 474, 476.

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Treating of this subject of seeking quarrel, an eminent text-writer says: "If a man determines to kill another, or to do him great bodily harm, and seeks occasion for a quarrel, he cannot avail himself of the passion excited in the quarrel, because he acts from an impulse which his mind receives in its cool moments." 2 Bishop Crim. Law, § 715. Elsewhere the same writer says: "If without provocation a man draws his sword upon another, who draws in defense, whereupon they fight, and the first slays his adversary, his crime is murder. For he who seeks and brings on a quarrel cannot, in general, avail himself of his own wrong in defense. But where an assault, which is neither intended nor calculated to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed, and if without time for his passion to cool, the assailant kills the other, he commits only manslaughter." 2 Bishop Crim. Law, § 702.

It would seem needless to say that the view of the law is supported by the most abundant authority. *State v. Lane*, 4 Ired. 113; *Reg. v. Smith*, 8 Car. & P. 160; *Slaughter's case*, 11 Leigh, 680; s. c., 37 Am. Dec. 638; *Murphy v. State*, 37 Ala. 142; *Adams v. People*, 47 Ill. 376; *State v. Hildreth*, 9 Ired. 429; s. c., 51 Am. Dec. 364; *State v. Hogue*, 6 Jones Law, 381; *State v. Martin*, 2 Ired. 101; *Atkins v. State*, 16 Ark. 568; *Cotton v. State*, 31 Miss. 504; *Stewart v. State*, 1 Ohio St. 66; *State v. Hill*, 4 Dev. & Bat. 491. In all of these cases I have cited, and I might have cited "a great cloud of witnesses" to bear testimony to this well-established legal principle, the idea is made prominent that the main feature in such cases is the intent with which the accused brought on the quarrel or difficulty: if with no felonious intent, no harboring of malice, no premeditated purpose of doing great bodily harm, or killing the person assaulted or with whom the quarrel is begun, then the accused is not a murderer, let the result of the difficulty turn out as it will. The view I will further illustrate by quotations from some of the cases cited, *supra*.

Thus in *Stewart v. State*, *supra*, THURMAN, J., said: "And again the combat must not have been of his own seeking, and he must not have put himself in the way of being assaulted, in order that when assaulted and hard pressed, he might take the life of his assailant. * * * Now it does seem to us clear that Stewart sought to bring on the affray, that he desired and intended, if as-

saulted, to make good his previous threats of using his knife. True he had a right to dun Doty for his money, but he had no right to do so for the purpose of bringing on an affray in order to afford him a pretense to stab his enemy."

In *Adams v. State, supra*, BREESE, J., said : "The twelfth instruction for the people was right. It was as follows : 'If the defendant sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention of taking the life of Bostic, they will find him guilty of murder, but if they find that defendant voluntarily got into the difficulty or fight with Bostic, but did not intend to kill him at the time, and did not decline further fighting before the mortal blow was struck by him, and then drew his knife and with it struck and killed Bostic, they will find the defendant guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by Bostic, or to prevent Bostic from getting an advantage in the fight.'"

In *Cotton v. State, supra*, FISHER, J., said : "The qualification by the court, made to the third instruction, is clearly erroneous. The instruction is, in substance, that if Cotton killed Smith, not in pursuance of a premeditated design, but on a sudden quarrel, the crime of murder is not made out. The modification made is, 'unless Cotton sought the quarrel, and used a deadly weapon.' The question was, whether malice prompted the accused to kill. He interposes, as his defense, by the instruction, 'no design to kill, and that the killing was on a sudden quarrel.' The court say to him that this is no defense, not even to mitigate the crime, if you sought the quarrel and used a deadly weapon. Now he may have done both without being guilty of murder ; for he may, by seeking the quarrel, have intended only the slightest personal injury to the deceased, and he may, from sudden provocation, have used his weapon, or he may have been forced to do so in self-defense, although he was the aggressor in the quarrel. The modification amounts to this, that although there must be a formed design to take life, to constitute murder, yet such design is not necessary where the party killing seeks the quarrel and uses a deadly weapon. There must be proof of malice, in some form ; the seeking of the quarrel and using the deadly weapon may be evidence for this purpose. But this is what the defendant below was endeavoring to meet by showing no design to take life, because the killing occur-

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red on a sudden quarrel. The modification virtually declares this to be no defense, if the party sought the quarrel."

In *State v. Lane, supra*, RUFFIN, C. J., said: "If the prisoner sought the deceased and entered into that fight with the purpose, under the pretense of fighting, to stab him, it was clearly murder; no matter what provocation was apparently then given or how high the prisoner's passion rose during the combat, for the malice is express and was promptly wreaked, and puts the idea of provocation out of the case."

In *State v. Hill, supra*, the defendant was convicted of murder in the first degree. He had "brought on the difficulty" by striking the deceased a blow with his fist, when the deceased stabbed him, and he thereupon stabbed and killed the deceased, but in circumstances which rendered it doubtful whether the act of the prisoner was the result of passion in consequence of being stabbed, or was necessary in self-defense, and GASTON, J., in delivering the opinion of the court, awarding a new trial, said: "It was necessary that the jury should, in the first place, ascertain whether the prisoner commenced the affray with a preconceived purpose to kill the deceased, or to do him great bodily harm. For if he did, there was nothing in the subsequent occurrences of the transaction which could free him from the guilt of murder. If the first assault was made with this purpose, the malice of that assault, notwithstanding the violence with which it was returned by the deceased, communicates its character to the last act of the prisoner. * *

* If upon consideration of all the evidence, the jury came to the conclusion that the first assault of the prisoner was not of malice prepense, then the subsequent occurrences demanded their careful consideration, because upon these the prisoner's guilt might be extenuated into manslaughter, or excused as a homicide in self-defense." Wharton has given the ruling in this case his approval. Whart. on Hom. (2d ed.), §§ 461, 462.

In a case which arose in Tennessee, DEADERICK, C. J., observed: "The charge in this case holds, in effect, that a person who may, by improper conduct, provoke an assault, cannot be allowed to rely on the plea of self-defense, nor can he rely upon such defense if he willingly engage in a fight, even if first assaulted and stricken. * * * Provoking words and gestures might be used from heat of blood, in a sudden quarrel, and a fight might, under such circumstances be engaged in, during which a party might have the

right to defend himself from impending danger of death or great bodily harm." *Daniel v. State*, 10 Lea, 261.

Horrigan & Thompson in their cases in self-defense, p. 227, in a note to *Stoffer v. State*, 15 Ohio St. 47; s. c., 86 Am. Dec. 470, have given an admirable summary of the authorities on this subject as follows: "1. If he (the slayer) provoked the combat or produced the occasion, in order to have a pretext for killing his adversary, or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. 2. But if he provoked the combat, or produced the occasion without any felonious intent, intending for instance an ordinary battery merely, the final killing in self-defense will be manslaughter only."

This distinction between the right of perfect and the right of imperfect self-defense is fully recognized in the formula above set forth, and that formula is fully indorsed by the Texas Court of Appeals in *Reed v. State*, 11 Tex. App. 509: s. c., 40 Am. Rep. 795. That court, when treating of this subject of self-defense, said: "It may be divided into two general classes, to-wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If however he was in the wrong — if he was himself violating or in the act of violating the law — and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself, which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense, which but for such acts would never have been occasioned. * * * How far and to what extent he will be excused or excusable in law must depend on the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his original act

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was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him calculated to produce death or serious bodily harm, and in resisting such attack he slays his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from any assault made upon him, would be manslaughter under the law."

The foregoing remarks are quoted with approval in *King v. State*, 13 Tex. App. 277, where the court remarks: "We think this view of the law is in harmony with our Code, and with the decisions construing it. It is not in conflict with the well-settled doctrine that he who seeks and brings on a difficulty cannot avail himself of the right of self-defense in order to shield himself from the consequences of killing his adversary. In fact, it is the same doctrine and is recognized and maintained by the best authority." This doctrine of perfect and imperfect self-defense is fully recognized by 2 Bish. Crim. Law, § 702, *supra*, and elsewhere in his work; also in *Cotton v. State*, and *Adams v. People*, *supra*.

Indeed the assertion of the doctrine that one who begins a quarrel or brings on a difficulty with the felonious purpose to kill the person assaulted, and accomplishing such purpose is guilty of murder, and cannot avail himself of the doctrine of self-defense, carries with it in its very bosom, the inevitable corollary, that if the quarrel be begun without a felonious purpose, then the homicidal act will not be murder. To deny this obvious deduction is equivalent to the anomalous assertion that there can be a felony without a felonious intent; that the act done characterizes the intent, and not the intent the act. The bare statement of such a doctrine accomplishes its own ample refutation; a doctrine inconsistent in its premises and illogical in its conclusion. The absurdity of such a doctrine may readily be shown by this syllogism: Without a felonious intent there can be no murder. A. brought on a difficulty with B., and in the sudden struggle which ensued, but without felonious intent, killed him. Therefore A. is guilty of murder. Or the form of the syllogism may be varied thus: He who with malice aforethought brings on a quarrel with and kills another is guilty of

murder, and cannot, however imminent his peril, avail himself of the doctrine of self-defense. A. without malice aforethought begins a quarrel with and kills B. in the endeavor to save his own life from a murderous assault by the latter. Therefore A. is a murderer and cannot invoke the doctrine of self-defense. Such a doctrine as this is at war too with the analogies of the law in similar cases; for if two with deadly weapons engage in a sudden encounter, and one should kill the other, the slayer will only be guilty of manslaughter.

Bishop says: "A common case is where two persons, upon a sudden quarrel, engage in mutual combat; then if either one in the heat of it kills the other, though with a deadly weapon, the offense is in most circumstances only manslaughter. * * * When the combat has become mutual it ordinarily ceases to be of importance by which party the first blow was given. And as we have seen, it makes no difference though the blow which proved fatal was, while prompted by the heat of the fight, inflicted with the intent to take life." 2 Bish. Crim. Law, § 701.

REDFIELD, C. J., takes the same view of the matter, for he says: "If the jury should regard this as a *bona fide* case of mutual combat, without previous malice on the part of the accused, and that mutual blows were given before the accused drew his knife, and that he drew it in the heat and fury of the fight, and dealt a mortal wound, although with the purpose of doing just what he did do, that is, of taking life, or what would be that intent if he had been in such a state as properly to comprehend the nature of his act, still it is but manslaughter." *State v. McDonnell*, 32 Vt. 491, 541.

Speaking of *Morley's* case, Lord HALE said: "And many who were of opinion that bare words of slighting, disdain or contumely, would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion, that if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and then B. kills A., that this is but manslaughter, for the second stroke made a new provocation, and so it was but a sudden falling out, and though B. gave the first stroke, and after a blow received from A., B. gives him a mortal stroke, this is but manslaughter according to the proverb, the second blow makes the affray; and this was the opinion of myself and some others." 1 Hale P. C. 456. In *Morley's* case it was agreed that "if upon ill-words both of the parties suddenly

fight and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter." 6 How. St. Tr. 769.

With these authorities and legal definitions before us, let us examine the testimony of the defendant, supported as it is by that of other witnesses in all essential particulars.

[Omitting this and other minor points.]

II. But granting that defendant was in the wrong; granting that by mere words he "brought on the difficulty," and no witness contends that he brought it on in any other way, still he had a right after the conflict began, to withdraw from the conflict; and this is what there is testimony tending to show he did in good faith try to do, and was trying to do when pressed so hard as to be compelled to use his pistol. Taylor had struck him and knocked him off the porch—was still striking him. A. J. Sollers, who had urged on the fight in the first instance, was still doing so, following close on Taylor's heels, shouting, "Give it to him, Bill, don't let him get away," while John Sollers, who had followed Taylor into the yard, had picked up the neck yoke, and only six or eight feet away, was coming toward defendant with the neck yoke in both hands, as if to strike him while he was retreating toward the gate, and it was at this juncture that he fired the shot. Taking this testimony as true, the second instruction asked by defendant should have been given; for it announces but the well-settled doctrine, that though a man should be in the wrong in the first instance, yet a "space for repentance is always open, and where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict," and his adversary still pursues him, then if taking life becomes necessary to save his own, he will be justified. 1 Bish. Crim. Law (5th ed.), § 871; Horr. & Thomp. Self-defense, 227; Foster, 276. Sir WILLIAM BLACKSTONE says: "When both parties are actually combatting at the time the mortal stroke is given, the slayer is then guilty of manslaughter, but if the slayer has not begun to fight, or having begun, endeavors to decline any further struggle, and afterward, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense." 4 Bl. Com. 184.

Treating of this subject of "retreating to the wall," Mr. Wharton aptly says: "The true view is, that a "wall" is to be presumed whenever a retreat cannot be further continued without probable

death, and when the only apparent means of escape is to turn and attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed by retreating will apparently expose himself to death." Whart. Hom., § 485. And in this connection it may not be amiss to remark that Taylor had no right to offer violence to defendant in order to eject him from his house, until he had first requested him to leave his premises, and not until more gentle means had proved unavailing. On this point Bishop observes: "If a man enters another's dwelling-house peaceably, on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbehaving himself therein." 1 Bish. Crim. Law, 859; Whart. Hom., § 552. I make this remark, because I find no evidence in the record that Taylor requested defendant to leave his premises before resorting to violence, and because of the language of the sixth instruction, given on behalf of the State. In the circumstances of this case, as already stated, the language of that instruction is misleading, as not being based on any testimony of a request to the defendant to leave, and because apparently sanctioning violence at the outset, and treating that violence in the light of necessary force.

For the errors heretofore noticed the judgment should be reversed and the cause remanded. BLACK and BRACE, JJ., concur; NORTON, C. J., dissents; RAY, J., will express his views in a separate opinion.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

HOIT v. HOIT.

(42 N. J. Eq. 386.)

Will — condition against opposition.

“If any or either of my children shall enter a *caveat* against this my will, he or they shall pay all expenses of both sides,” is a good condition in a will, without a gift over, against a devisee under the will. (*See note, p. 46.*)

ON appeal from a decree of the vice-chancellor, 40 N. J. Eq. 478. The opinion states the case.

Oscar Jeffery, for appellant.

J. G. Shipman & Son, for respondent.

SCUDDER, J. John G. Hoit, late of the township of Oxford, in the county of Warren, and State of New Jersey, by last will and testament duly executed, devised and bequeathed to his wife, Sarah Hoit, the appellant, certain lands and all his personal property, and she was to pay all his just debts, funeral and other expenses. In subsequent parts of the will he devised severally to his sons, tracts of land for certain estates and on limitations therein contained. The will concludes with the sentence: “If any or either of my children shall enter a *caveat* against this my will, he or they shall pay all the expenses of both sides.” Nathan Hoit, one of the testator’s sons, and a devisee in his will, did enter a *caveat*

against the will; the Orphans' Court certified the questions involved in the controversy into the Circuit Court of the same county, and they were tried upon an issue framed, a verdict found for the proponent, which was certified and returned to the Orphans' Court, and the will admitted to probate. That court made an order concerning the costs, expenses and allowance of counsel fees under section 20 and section 177 (amendatory of section 169) of the Orphans' Court act, adjudging that the contestant had reasonable cause for contesting the validity of the will, and that the costs and expenses of the litigation as well on the part of the contestant as on the part of the executrix propounding said will for probate, be paid out of the estate of the decedent.

The appellant, who was the executrix named in the will, paid these costs and expenses out of her legacy and portion of the estate, and filed a bill in chancery against the contestant, Nathan Hoit, praying that he might be decreed to pay to her, out of his said devise, or otherwise, all the costs she had been compelled to pay by reason of the costs and expenses in contesting the *caveat* against the said will and testament. To this bill a general demurrer was filed by the defendant, and the demurrer, on hearing, was sustained, and the bill dismissed with costs. From this decree, advised by the vice-chancellor, the appeal was taken.

The appellee having taken the benefit of the devise of land to him under the will of his father, there would seem to be no reason why he should not reimburse the appellant for the costs and expenses paid by her consequent on the entry of a *caveat* against the will by him, contrary to its expressed condition, and with the consequence therein imposed. The intention of the testator is clearly expressed that if either of his children, devisees under his will, contested, he shall pay all expenses incurred. There is no room for any other construction. The only question is whether this is a legal condition or restriction in this case.

Conditions in wills against disputing their validity with the consequence of forfeiture of bequests, or devises therein, if broken, have often been considered in the courts with attempts at artificial distinctions between legacies of personal property and of real estate; and whether there be probable cause for contesting the will, *probabilis causa litigandi*; and any gift over or not. It is said that conditions subsequent as to gifts of personalty are, in accordance with the rule of the civil law, held to be void, *in terrorem* merely,

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if there be no gift over; but if there be a gift over, the condition is good, such gift over being sufficient evidence that they were not meant to be *in terrorem* only. But it has been also held that this doctrine of the necessity of a gift over has never been applied to devises of real estate. *Powell v. Morgan*, 2 Vern. 90; *Loyd v. Spillet*, 3 P. Wms. 341; *Morris v. Burroughs*, 1 Atk. 404; *Bradford v. Bradford*, 19 Ohio St. 546; *Chew's Appeal*, 45 Penn. St. 228; *Jarm. Wills* (R. & T. ed.), 582; 2 Wms. Exrs. *1146; 2 Redf. Wills, *298, § 34; *Theobald Wills*, 452-455.

It is not material to determine in this case whether in bequests of personalty the artificial rules above named would be applied in this State, for the appellee is a devisee of real estate; and under the case *Cooke v. Turner*, 15 M. & W. 727; s. c., 14 Sim. 218, 493, a condition for revocation if the devisee shall dispute the will is valid in law.

Upon another and broader principle of equity, the appellee should not be allowed to defeat the intention of the testator that there should be no litigation over his will at the expense of the estate, or in this case, at the expense of his widow, the legatee of the portion of his property charged with the payment of debts and expenses. This is not strictly the doctrine of election between repugnant gifts, but a rule of equitable construction that a person cannot accept and reject the same instrument, and that there is an implied condition that he who accepts a benefit under it shall adopt the whole by conforming to all its provisions. This is the rule on which the doctrine of election is founded. *Hyde v. Baldwin*, 17 Pick. 303; *Gretton v. Haward*, 1 Swans. 509; *Dillon v. Parker*, 1 Swans. 359, 394; *Streatfield v. Streatfield*, Cas. t. Talb. 183; 1 Lead. Cas. in Eq. (W. & T.) 273; 2 Story Eq. 1077.

This devisee has opposed the intention of the testator by disputing his will and casting the burden of the expense of litigation on the estate, thus holding the full amount of his legacy under the will, without any diminution or compensation for his breach of this condition. It is not a case of forfeiture by the terms of the will, but one for compensation out of the fund received by him from the testator, which must be met, unless there be some exception from the above-cited general equitable rule, by which he may keep what he has received and defy the purpose of the giver. This is said to be the effect of section 177 of the Orphans' Court act, by which that court made and has ordered that the costs and expenses

of contesting the probate of the will shall be paid out of the estate of the decedent, and that the provision of the will, imposing the payment of the costs and the expenses of the litigation on the contestant, is void because against this statute and the declared policy of the law. But conditions in wills trenching on the liberty of the law are described to be such as are in general restraint of marriage, trade, agriculture and the like, in which the State has an interest, and not as to who shall take under a will, which can only affect those who are directly concerned. There is no express prohibition of the disposition of property by will in such terms as the testator shall see fit to impose, nor can such a purpose be inferred from the terms of this act. The Orphans' Court may order in all cases, and in the first instance, by whom the costs and expenses shall be paid, but as the will of the testator is only before it for granting or refusing probate, and there is no jurisdiction to construe its disposition of property, it has not the power to annul the will in whole or in part. After the order for the payment of costs and expenses has been made and enforced, as has been done in the Orphans' Court in this case, the jurisdiction of a court of equity remains to construe the will and compel the person who has taken a benefit under it to comply with the condition on which he has accepted the bounty of the testator. Full effect is given to this statute by an order made for costs and expenses in all cases where there is no equity in the will itself beyond the control of the Court of Probate; but if a party be aggrieved by an order made contrary to the provision of the will, as in this case, he may come to a court of equity and obtain relief.

This is the case presented in the bill of complaint to which a demurrer has been filed for want of equity, and the order sustaining the demurrer and dismissing the bill should be reversed, and the demurrer overruled, with costs.

Decree unanimously reversed.

NOTE BY THE REPORTER.—In *Cooke v. Turner*, cited in the principal case, ROLFE, B., said: "The ground on which the proviso was made to rest was, that every heir at law ought to be left at liberty to contest the validity of his ancestor's will, and that any restraint artificially introduced might tend to set up the wills of insane persons, and would in the language of the Touchstone, (182), be 'against the liberty of the law.' We cannot however adopt this reasoning." Citing *Stapilton v. Stapilton*, 1 Atk. 2. "The truth is that in none of these cases is there any policy of the law on the one side or the other. The

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conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the State has or may have an interest to have done. The State, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by a condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the State that he should do. So the State is interested in having its subjects embarked in trade or agriculture, and therefore it will not allow a condition defeating an estate, in case its owner should engage in commerce, or should plough his arable land, or the like. The principle on which such conditions are void are analogous to that on which conditions defeating an estate unless the owner commits a crime are void. In the latter case the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us the State has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the State whether the land is enjoyed by the heir or the devisee; and we conceive therefore that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another. The question, whether this proviso is a proviso void as being contrary to the policy of the law, may be well tested by considering how the case would have stood, if instead of a condition subsequent, it had been made, as a substance it might have been made, a condition precedent. Suppose the testator had said, in case my daughter and her husband shall execute all deeds necessary for settling my estates in manner hereinafter mentioned, then I give her, etc., surely, there would be no doubt of the validity of such a condition as a condition precedent; and if so, it must be valid as a condition subsequent; for where a condition is bad on grounds of public policy, it must obviously be bad whether it be precedent or subsequent. The law will no more allow any thing contrary to public policy to be made the means whereby the party shall entitle himself to an estate, than whereby he shall be made to lose that of which he is already in possession."

The same doctrine was held in *Boanturel v. Boanturel*, L. R., 1 Priv. C. 1, on the authority of *Cooke v. Turner*.

In *Chew's Appeal*, 45 Penn. St. 228, it was held that where such provisions are merely denounced against disputing a will or its provisions, without a devise over, they are only to be considered *in terrorem*, and not as fixing intestacy, on the share of the litigant devisee. But where there is a devise over in case of a violation of such provision, to some person named, or a provision that the share thus limited shall fall into the residue of the estate for distribution, the devise thus limited will pass upon breach of the condition, unless there exists probable cause for disputing, or where it would be a mere penalty and really subversive of the primary intent of the testator. *Cooke v. Turner* was not noticed.

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In *Mallet v. Smith*, 6 Rich. Eq. 12, DUNKIN, C., said, *obiter*: "Without intention or authority to commit the court to this extent, I express my own opinion, in which Chancellor JOHNSON fully concurs, that a condition subsequent of this description is void, whether there be a devise over or not, as trenching on the 'liberty of the law,' Shap. Touch. 182, and violating public policy." Citing *Morris v. Burroughs*, 1 Atk. 404; *Powell v. Morgan*, 2 Vern. 91, and disapproving *Cooke v. Turner*, observing. "It seems to me that this is a very narrow view of public policy. It is the interest of the State that every legal owner should enjoy his estate, and that no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law."

In *Bradford v. Bradford*, 19 Ohio St. 546, it was held that such a condition is valid in respect to personal as well as real estate, disapproving the English *in terrorem* doctrine. The court said: "It would be difficult to assign a satisfactory reason, grounded upon principle, for holding otherwise in regard to personalty. In regard to both, it is the duty of the courts to carry out the intention of the testator, unless that intention be contrary to the policy of the law. No considerations of public policy require that an heir should contest the doubtful questions of fact or of law upon which the validity of a devise or a bequest may depend. The determination of such questions ordinarily affects only the interests of the parties to the controversy." The court quote and approve the language of Redfield (*Wills*, 679), "and it is agreed that there is no substantial ground for any distinction in this respect between real and personal estate. Hence we assume that in this country, any such condition, which is reasonable—as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation will be binding or valid."

This case was followed in *Thompson v. Gant*, 14 Lea, 810, without discussion.

The same doctrine was adopted in *Donegan v. Wade*, 70 Ala. 501, and applied to the case of one aiding and advising another contestant, in a suit never brought to trial.

In *Jackson v. Westerfield*, 61 How. Pr. 399, the contrary was held, at Special Term, in case of opposition in good faith.

HEYDER V. EXCELSIOR BUILDING LOAN ASSOCIATION.

(48 N. J. Eq. 408.)

Mortgage—mortgages permitting mortgagor to retain custody—fraudulent cancellation by latter.

If a mortgagee permits the mortgagor to retain the mortgage, and the latter fraudulently cancels it of record, the mortgagee cannot enforce it as against a subsequent *bona fide* grantee.

ON appeal from a decree of an advisory master. The opinion states the point.

C. T. Glen, for appellants.

Guild & Lum, for respondents.

KNAPP, J. The learned master who decided this cause reached the conclusion on the evidence that the purchaser of the premises, and not the mortgagee, should bear the loss incident to the fraudulent cancellation of the mortgage made upon the record prior to the purchase, on the faith of which cancellation the buyer parted with the whole purchase-money, believing the property to be unincumbered. After a careful review of the case, I am led to an opposite result. I am fully impressed with the importance of securing due protection to the holders of mortgage securities, where in pursuit of the provisions of the registry laws the lien has been made apparent on the record. The security afforded by registry should remain undisturbed by a cancellation effected through mistake, accident or fraud of third persons; even if by such cancellation subsequent mortgagees or purchasers are made to suffer loss. Such after-acquired rights ought not to prevail against the just claims of an innocent, non-negligent incumbrancer, because the record has been wrongly effaced.

Cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and it is left to the owner making the allegation to prove the cancelling to have been done by fraud, accident or mistake. Such proof being made, the mortgage will be established, even against subsequent purchasers or mortgagees without notice. *Trenton Banking Co. v. Woodruff*, 1 Gr. Ch. 117; *Harrison v. N. J. R. Co.*, 4 C. E. Gr. 488.

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Between a mortgagee, whose mortgage has been discharged of record, solely through the unauthorized act of another party, and a purchaser who buys the title in the belief, induced by such cancellation, that the mortgage is satisfied and discharged, the equities are balanced, and the rights, in the order of time, must prevail. The lien of the mortgage must remain, despite the apparent discharge.

But this is apart from any default attributable to the holder of the lien. If through his negligence the record is permitted to give notice to the world that his claim is satisfied, he cannot, in the face of his own carelessness, have his mortgage enforced against a *bona fide* purchaser, taking his title on the faith that the registry is discharged.

Where one gives to another the power to practice a fraud upon innocent parties, the court will not interfere in his protection at the expense of those who have been deceived and misled by such fraud. What circumstances shall be sufficient to establish negligence, such as shall preclude a mortgagee from a decree establishing his cancelled paper, must be determined as a question of fact in each particular case, tested by those rules of conduct which men of common prudence usually observe in the care and management of such securities.

That it is negligence in the owner of a mortgage to permit it to be in the custody and control of the mortgagor or owner of the mortgaged premises, in view of the provisions of our statute of registry, will not admit of denial. Such an occurrence is so unusual, so imperils the owner, and is therefore so unlikely to happen in business dealing, that it was regarded, in *Harrison v. New Jersey R. Co.*, as ground for the gravest suspicion of the truthfulness of a witness who had testified to such custody by the assent of the owner of the security.

The minute of discharge of this mortgage, made upon the record by the register, expressed in general form the fact of cancellation. The entry was made upon evidence presented to the register, such as the statute has declared to be his sufficient authority for so doing. The mortgage was produced by the mortgagor, cancelled, and there is no doubt that upon the faith of this cancellation, the purchaser took title to the property and paid the consideration. But it clearly appears that the mortgage was unpaid, and that the act of the mortgagor in procuring the entry of its discharge was fraudulent and without the knowledge or assent of the mortgagee. If this were all of the case, and

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no default appeared on the part of the mortgagee, notwithstanding the forcible language of the act which declares such minute to be a full and absolute bar to and discharge of the said entry, registry and mortgage, the right of the respondent to the lien of its security should be maintained, and it is solely upon the grounds that the respondent is chargeable with negligence which tended to and actually did produce the injury, that I think the decree should be reversed. The mortgage was in the possession and under the control of the mortgagor at the time when it was produced for cancellation on the record. How long he had such custody does not positively appear, but the strong inference from the testimony is that it was during the whole time between the registry of the mortgage and its cancellation. Neither the president of the association nor its treasurer, who had charge of its securities, were able to say that they ever had the actual custody of this mortgage; and they further declare that the mortgagor, although an officer of the company, had no access whatever to the securities in the possession of the treasurer. It is therefore impossible that he should have obtained its possession by means resembling theft. His possession must, I think, be attributed either to the assent or to the negligence of the officers of the association responsible for its securities. If we regard the theory that the mortgagor, at the conclusion of his transaction for the loan, fraudulently substituted a copy of the mortgage for the original paper, and delivered that to the association, I am still forced to the conclusion that the officers were culpably negligent in permitting themselves to be thus imposed upon. The fact that he was the law officer of this body would not justify so implicit a trust in him in the matter of a loan to himself. We must assume that these officers were men of business capacity and skill. The transaction was in the line of their ordinary duties. Indeed they did not trust to him, but employed other counsel to make searches against his property. In their ordinary transactions their habit was to submit to counsel the securities received for loans for inspection and approval. The slightest examination of the paper received by them would have shown it to be but a copy. They submitted it to no legal adviser, they gave it no examination. If it were not intended to be, as was its purport, a mere copy, leaving the original in other hands, any degree of care exceeding the blindest confidence must have revealed the deception. The theory fails to lead us out of the difficulty. I do not think that any circum-

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stance presented in this case made it the appellant's duty, in order to avail himself of the rights of a *bona fide* purchaser, to institute personal inquiry of the mortgagee. Any rule placing him under this exaction would embrace every case of a purchase of lands that had ever been subject to mortgage, which the record showed to be cancelled. Such a rule, it is needless to say, would render this provision of the registry act entirely nugatory. A purchaser could then only buy with safety when the registry had been discharged and an admission of payment obtained from the mortgagee. Doubtless, circumstances may, and frequently do arise to put the purchaser upon inquiry and charge him with notice. It seems to me that nothing appears in this transaction which should have put this purchaser upon further inquiry. He was permitted to rely upon the record. He did so, purchasing upon the belief that it spoke the fact truly. It was false, but the deception was directly traceable to the culpable negligence of the mortgage owner, and the loss should fall upon the party chargeable with the fault.

The decree below should be reversed, and the bill of complainants be dismissed.

Decree unanimously reversed.

BUTTLER V. ROSENBLATH.

(42 N. J. Eq. 651.)

Marriage — tenancy by entireties.

Under a statute enabling married women to own real estate in the same manner as single women, a deed of lands to husband and wife still constitutes them tenants by the entirety.*

ON appeal from decree of the vice-chancellor. The opinion states the case.

Abel I. Smith and Fred. W. Stevens, for respondent.

Hoffman & Herbert, for respondents.

VAN SYCKEL, J. The bill in this case was filed by Elizabeth Rosenblath, a judgment-creditor of Christian Buttler, to set aside certain conveyances of real estate alleged to be fraudulent as against

* See *Neelly v. Lancaster* (47 Ark. 175), 58 Am. Rep. 752.

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her. The lands in question were conveyed October 12, 1881, by one Catharine Quidort to said Christian Buttler and Minna, his wife. The decree of the Court of Chancery declares the conveyance by the judgment-debtor void as against the judgment of the complainant, and also adjudges that by virtue of the conveyance aforesaid to said Christian and Minna, the said Christian was seised, as against said complainant, as tenant-in-common with his said wife of the lands so conveyed. I concur in the view taken by the court below, that the conveyances set aside were fraudulent as to said judgment-creditor. The only question therefore to be discussed is as to the effect of the Married Woman's Act upon an estate granted or conveyed to husband and wife.

In a recent case in England, the construction of the Married Woman's Property Act of 1882 was directly involved. *Mander v. Harris*, L. R., 24 Ch. Div. 222. The act provides that "a married woman shall, in accordance with the provisions of said act, be capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee. Mr. Justice CHITTY delivered the opinion of the court, that the old rule of law that husband and wife were for most purposes one person, so that under a gift by will to a husband and wife and a third person, the husband and wife took only one moiety between them, the third person taking the other moiety, is no longer applicable to such a gift under a will that has come into operation since the passage of the act of 1882. The case was reversed on appeal on the ground that the will was executed before the passage of the act of 1882, and the court declined to express any opinion as to the effect of such words in a will made after the said act came into operation. *Mander v. Harris*, L. R., 27 Ch. Div. 166.

In New York, the acts respecting married women do not differ substantially from our own so far as the question now considered is concerned. The question was elaborately and ably discussed in a recent case in the New York Court of Appeals. The conclusion there reached is that the common-law doctrine has not been abrogated by the statutory provisions, and that under a conveyance to a husband and wife jointly they take, not as tenants in common, or as joint tenants, but as tenants by the entirety, and upon the death of either the survivor takes the whole estate. *Bertles v. Nunan*, 92 N. Y. 152; s. c., 44 Am. Rep. 361.

Our legislation which preserves to married women their separate rights of property has no effect upon the capacity of the wife to take property; she has no greater right to receive conveyances than she had at common law, but legislation has secured to her what she did not have at common law, the use, benefit and control of her own real estate.

The statute does not purport to deprive or limit the estate husband and wife shall take in lands conveyed to them jointly. It does not change or modify in any wise the signification or effect of terms used in common-law conveyances. It simply enables the wife to have and enjoy whatever estate she gets by any conveyance made to her, or to her and others jointly, and does not enlarge or diminish the estate. It operates upon the enjoyment, and not upon the character, *quantum* or extent of it.

It is argued that the reason upon which the common-law rule rests has ceased to exist, and hence that the rule should no longer be adhered to. This contention is not well founded.

This legislation has not destroyed the unity of husband and wife, recognized in the common law, and made them substantially separate persons in respect to property rights.

In this State the wife cannot convey her lands, unless the husband joins in the execution of the deed. The husband cannot convey directly to the wife, nor the wife to the husband.

The common-law incidents of the marriage relation are not all swept away. The rule is everywhere recognized that they are extinguished only where the intention to remove them clearly appears. The ability of the wife to make contracts is limited, and she can bind herself only where she is expressly authorized by statute to do so. Nor is her estate so absolutely freed from the effect of the marriage relation as to deprive the husband wholly of his common-law right of tenancy by the curtesy.

Although the cases are conflicting, there is abundant authority to support the view of the New York courts that the husband and wife are seised by the entirety, *per tout et non per unum*, and upon the death of either, the whole survives to the other. *Diver v. Diver*, 56 Penn. St. 106; *Fisher v. Provin*, 25 Mich. 347; *Bates v. Seely*, 46 Penn. St. 248; *Marburg v. Cole*, 49 Md. 402; s. c., 33 Am. Rep. 268; *McDuff v. Beauchamp*, 50 Miss. 531; *Chandler v. Cheney*, 37 Ind. 391.

Our own cases are in line with these decisions. In *Thomas v. DeBaum*, 1 McCart. 37, Chancellor GREEN decided that the act of

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our legislature converting estates in joint tenancy into tenancies in common does not extend to estates held by husband and wife in entirety; and in the subsequent case of *McDermott v. French*, 2 McCart. 78, he adhered to the previously expressed view that by a conveyance to husband and wife they became seised, as at common law, of the entirety.

In *Washburn v. Burns*, 5 Vr. 18, there does not appear to have been any question as to the rule that the husband and wife were seised of the entirety. The point made was that as the wife was seised of an indivisible entirety, there was nothing left upon which the grant of the husband could act.

The chief justice, in delivering the opinion of the court, said, upon the authority of *Den v. Gardner*, Spen. 556, that the husband was entitled to the use and possession of the entire property during the joint lives of himself and wife. He is careful however to state in his opinion "that the extent of the interest which the male defendant had in these lands was not at all involved in the case." The effect of the Married Woman's Act upon the extent of the husband's interest was not considered in either of these New Jersey cases. The inference to be drawn from this fact is that the learned judges who decided these cases entertained a clear conviction that the common-law estate was not converted into a tenancy in common.

The cases of *Lee v. Zabriskie*, 1 Stew. Eq. 422, and *Kip v. Kip*, 6 Stew. Eq. 213, relied upon to support the contrary doctrine, do not go so far. In the first of these cases there was a gift of income to husband and wife. The ordinary held that under a gift of income to a man and his wife, each is entitled to one-half the income. In the other case there was a conveyance of lands to husband and wife. The effect given to the Married Woman's Act of 1883 was that it abolished the common-law rule, so far as that rule excluded a wife, during coverture, from the enjoyment of property thus held.

In my judgment, the legislation in this State has not destroyed the common-law effect of a conveyance to husband and wife, and converted it into a tenancy in common. To constitute a tenancy in common between husband and wife, there must in the conveyance be an expression of an intention to do so.

The only question is, what is the relation of the wife to the land, in such a case, during the life of her husband?

That question was not considered in the leading New York case, which has been cited. At common law, the husband, during the joint lives, could for his own benefit take all the profits of the lands, and could mortgage and convey an estate to continue during the joint lives, but could not prejudice the right of the wife to take the estate in case she survived him. This has, since 1846, been the accepted rule in this State. *Den v. Gardner*, Spen. 556; *Washburn v. Burns*, 5 Vr. 18.

In virtue of the married relation the husband took possession and deprived the wife of the enjoyment of her estate or interest in the lands during their joint lives. In my opinion, the object and effect of the Married Woman's Act is to extinguish this right, which the husband had at common law to appropriate to his own use during the life of the wife, her estate in lands or real estate thus held, and to enable her to possess and enjoy it as fully as if she were a single woman.

There is nothing in this legislation which is intended to affect or which does affect the estate which the husband takes in his own right, or which can operate to withhold that estate from the husband's creditors.

The entire estate during the joint lives of the husband and wife, having before the statute been subject to execution for the husband's debt, it was the purpose of the statute to save the wife's right from the operation of that rule. There is nothing in the law to justify the inference that the husband's right is to be shielded from the pursuit of creditors. Any device of this character for the protection of the husband's property from his creditors is unknown to the common law, and so contrary to public policy that it ought not to be engrafted upon our system of laws by the interpretation of this statute, unless the intent to do so is clearly expressed. Such a claim cannot be rested upon the ground that the wife is seised under the common-law rule, of an indivisible entirety, and that she is entitled to the possession of the whole with her husband. As has been shown, she was not at common law, as against the husband's grantee or creditor, entitled during the joint lives to the possession of the estate or any part of it. Her right of survivorship only was secure against the husband's appropriation. It seems impossible to maintain the wife's right to the possession of the whole upon the idea that she has an indivisible entirety, without adhering strictly to the doctrine of unity between husband and wife as recognized in

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the common law. If that doctrine is in no respect modified by the statute, then the common-law rule, that the husband may dispose of the estate during the joint lives, must still prevail, and the wife will derive no benefit through this legislation, where the estate is by entirety.

There is nothing in the Married Woman's Act which indicates an intention to exclude this estate wholly from its operation. I think therefore that the just construction of this legislation, and the one in harmony with its spirit and general purpose, is that the wife is endowed with the capacity, during the joint lives, to hold in her possession, as a single female, one-half the estate in common with her husband, and that the right of survivorship still exists as at common law.

The decree below should be reversed with costs, for the purpose of modifying it in accordance with the views herein expressed.

For affirmance, MCGREGOR, J.—1.

For reversal, The Chief Justice, DEPUE, DIXON, KNAPP, MAGIE, PARKER, SCUDDER, VAN SYCKEL, BROWN, COLE, PATERSON, WHITAKER, JJ.—12.

Decree reversed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

LAWRENCE V. PULLMAN'S PALACE CAR COMPANY.

(144 Mass. 1.)

Sleeping-car company — liability for refusing berth.

A railroad corporation and a palace car company executed a contract, by which the car company was to furnish passenger cars for the corporation, keep them in order, and provide employees to collect the fare from passengers in such cars and attend upon them, and its employees were to be governed by the rules and regulations of the railroad corporation. The railroad company was to provide fuel, and the railroad conductors had full authority over the employees of the palace cars in determining who should ride in the cars, and in what circumstances. A regulation of the railroad corporation provided that between B. and N. a ticket for a sleeping berth in the palace cars should be sold only to one holding a ticket over the whole route. A., who had a ticket from B. to P., an intermediate station, and another ticket from P. to N., applied for a sleeping berth ticket from B. to N. but the ticket agent refused to sell it to him, because he did not have a single through-ticket to N. A. then entered the palace car at B., and the conductor of that car refused to sell him a sleeping berth for the same reason, and the train conductor also refused to furnish A. with a sleeping berth unless he would pay full fare from B. to N., which he declined to do. The train conductor, after A. had repeatedly refused to leave the car upon his request, placed his hand upon him, when A. arose, and the palace car conductor took hold of A.'s arm. A. then walked to the door of the car, the train conductor opened it, and the palace car conductor again took hold of A.'s arm and led him across the platform, the train being in motion, and into another car, the door of which was opened by the train-conductor. This car was provided with reclining chairs, one of which A. occupied; and

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during the night the car became cold, in consequence of which A. caught a severe cold. *Held*, that A. could not maintain an action against the palace car company.

ACTION for unlawful ejection from a car. The head-note states the facts. The defendant had judgment below.

S. B. Allen & T. B. King, for plaintiff.

B. N. Johnson, for defendant.

DEVENS, J. The gist of the plaintiff's claim is that he was wrongfully refused accommodation in the sleeping car of the defendant, in coming from Baltimore to New York, by the defendant's servants; and that on declining to leave the car, he was ejected therefrom. His argument assumes that it was for the defendant to determine under what circumstances a passenger should be allowed to purchase a berth, and incidentally, the other accommodations afforded by the sleeping car. An examination of the contract with the Pennsylvania Railroad Company, by virtue of which the cars owned by the defendant were conveyed over its railroad, shows that while these cars were to be furnished by the defendant corporation, they were so furnished to be used by the railroad company "for the transportation of passengers;" that its employees were to be governed by the rules and regulations of the railroad company, such as it might adopt, from time to time, for the government of its own employees. While therefore the defendant company was to collect the fares for the accommodations furnished by its cars, keep them in proper order, and attend upon the passengers, it was for the railroad company to determine who should be entitled to enjoy the accommodations of these cars, and by what regulation this use of the car should be governed. The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made.

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The railroad company had classified its trains, fixing the terms upon which persons should become entitled to transportation in the sleeping cars, and the cars in which such transportation would be afforded. It was its regulation that between Baltimore and New York this accommodation should only be furnished to those holding a ticket over the whole route. It does not appear that this was an unreasonable rule, but whether it was so or not, it was the regulation of the railroad company, and not of the defendant. The evidence was, "that the ordinary train conductors of the Pennsylvania Railroad Company have full and entire authority over the porters and conductors of the Pullman cars, in regard to the matter of determining who shall ride in the cars, and under what circumstances, and in regard to every other thing, except" the details of care, etc. The defendant's servant, the plaintiff having entered the sleeping car, informed him that his "split tickets," as they are termed, were not such as would entitle him to purchase a berth, and that he could sell only to those holding "through passage tickets, intact, to the point to which sleeping accommodations were desired." The plaintiff was in no way disturbed until the train conductor (who was not the defendant's servant) came into the car, informed the plaintiff that his tickets were not such as to entitle him to purchase the sleeping car ticket, and several times urged the plaintiff to leave the sleeping car, which the plaintiff refused to do. Whether accommodation was rightly refused to the plaintiff or not in the sleeping car, the refusal was the act of the railroad company's servant, and not of the defendant's, whose duty it was to be guided by the train conductor.

The ejection of the plaintiff was also the act of the railroad company, and not of the defendant. It is the contention of the plaintiff, that even if he might be ejected from the car, it was done in an improper manner. The plaintiff testified that he was waiting for a "show of force," after his repeated refusals to leave the car. This exhibition of force was made by the train conductor, who put his hand upon him, when the plaintiff arose and yielded thereto. The defendant's conductor took hold of the plaintiff's arm when he rose, and aided the plaintiff in crossing the platform of the cars, but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant company; he was assisting the train conductor in the duty he was performing as a servant of the

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railroad company. To conduct him across from one car to another in the manner described by the plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of the defendant's servant was in every way calculated to assist the plaintiff in his transit from one car to another.

Nor is the fact important that the car into which the plaintiff was passed subsequently became cold, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that when the plaintiff entered the car, it was not in fit condition to receive passengers; and by the contract, the management of it and the duty of furnishing fuel were entirely with the railroad company, and not with the defendant.

Judgment on the verdict.

BURNHAM V. NEVINS.

(144 Mass. 88.)

Easement — passage-way — obstruction — bay-window.

Where city lots are conveyed with the reservation of a passage-way, five feet wide, in the rear, with no outlet at one end, for the purpose of access to the street, the rights of abutters on that way are not infringed by the erection of bay-windows projecting over it from thirteen to eighteen inches, not interfering with foot passage. (*See note, p. 64.*)

BILL to remove obstructions from passage-way. The facts appear in the opinion. The defendant had judgment below.

H. D. Hyde, for plaintiff.

F. V. Balch & F. Rackemann, for defendant.

MORTON, C. J. The defendant does not deny that the plaintiff has the right to use the passage-way as a means of access to his lot from Joy street. The question in the case is as to the extent of this right, and whether, in projecting bay-windows over the passage-way in the manner alleged in the bill, the defendant is violating this right. The windows do not interfere with passing to and fro over the passage-way. The bill alleges that there are two rows

of windows, one beginning seven feet and nine and a half inches above the level of the passage-way, extending upward sixty-five and a half feet, being fourteen and a half feet wide, and projecting eighteen inches over the passage-way; and the other beginning seven feet and three inches above the level of the passage-way, being of the same height, eight feet and ten inches wide, and projecting over the passage-way thirteen and a half inches. Such windows do not materially interfere with the use of the passage-way for the ordinary purposes of passing on foot; but if the plaintiff has, as he contends, the right to have the passage-way kept open and unobstructed from the ground upward for its full width of five feet, for the purposes of light and air, it is clear that his rights have been invaded by the acts of the defendant.

The various cases which have arisen as to the right of the owner of land, subject to a right of way, to build or project structures over the way, have all been decided upon the same general principles. The difference in the results arises from the application of these principles to a difference in the grants by which the way is created, and in the other circumstances of the cases.

These general principles are, that a man who owns land, subject to an easement, has the right to use his land in any way which is not inconsistent with the easement, but has no right to use it in a way which is inconsistent with the easement; and that the extent of the easement claimed must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate and the parties which have a legitimate tendency to show the intention of the parties.

In the leading case of *Atkins v. Bordman*, 2 Metc. 457, it was held that a passage-way about five feet in width, running from Washington street to rear land owned by the plaintiff, might be built over by the owner of the front land. The court held that by the true construction of the grant under which the plaintiff claimed, he acquired merely the right of "a suitable and convenient foot-way to and from the grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions and necessities for family use, and to use for that purpose wheelbarrows, hand-sleds, and such small vehicles as are commonly used for that purpose in passing to and from the street to a dwelling in the rear, through a foot-passage, in a closely built and thickly settled town." 2 Metc. 468. It was therefore adjudged that the owner of the fee

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might build over the way in a manner which did not render it unfit for these purposes.

This decision was followed in *Gerrish v. Shattuck*, 132 Mass. 235, in which the reservation to the plaintiff was of "passage-way four feet wide in, through, and over said premises, from said Prescott street to my tenement on the westerly side thereof." It was held that this reserved a foot-way for passing and repassing, with such incidental rights as are necessary to its enjoyment; and that the owner of the servient premises might build over it in such manner as not to interfere with these purposes.

In the case of *Schworer v. Boylston Market Association*, 99 Mass. 285, it was clear that the passage-way could not be built over, because the grant to the plaintiff expressly provided that it should not be "subject to have any fence or building erected thereon," and because the other parts of the deed and the facts of the case show that the intention of the parties was that it should be in the nature of an open court or street.

In *Brooks v. Reynolds*, 106 Mass. 31, the passage-way was expressly declared to be "for light and air;" and it was held that it could not be covered in whole or in part.

The cases of *Salisbury v. Andrews*, 128 Mass. 336, and *Attorney-General v. Williams*, 140 Mass. 329; s. c., 54 Am. Rep. 468; were decided upon the ground that the terms of the grants and the surrounding circumstances showed that the purpose was that the passage-ways in question should be kept open and unobstructed, substantially as streets or courts, not only for the purpose of passing and repassing, but also for purposes such as streets are ordinarily used for — for light, air and prospect.

The rights of the parties in this suit therefore depend upon the construction of the grant to the plaintiff's grantors in 1832. It is a grant of "a right and privilege in common with me, my heirs and assigns, in a five feet passage-way, leading from the north-easterly corner of said land to said Belknap street." In the same breath, the grantor reserves to himself "the right and privilege of using as a passage-way in common with said grantees, their heirs and assigns, a strip of land five feet wide across the northerly end of said granted premises, the said passage-way to be maintained and supported at the common expense of the several abutters." The passage-way reserved was a continuation of the passage-way named in the grant to the plaintiff's grantors. The effect of the two clauses

was to provide for a passage-way running from Belknap street (now Joy street) in a westerly direction for a distance of ninety-six feet across the rear of the two lots now owned by the plaintiff and the defendant. It is only five feet in width, and has no outlet at the westerly end. It is too narrow to be used for horses and carriages, and clearly was not designed for such use. It is not of the character of a street or court. The purpose seems to have been to provide a narrow foot-way leading to the rear of the defendant's and plaintiff's lots, and of the lot next westerly of the plaintiff's, and of the lot on the northerly side of the way, designed for passing and repassing on foot and for carrying, in small vehicles, articles necessary for family use, and generally to be used as such ways are ordinarily used in a large city.

The grants to the plaintiff and to the other abutters contain no provision that the way is to be kept open to the sky for light, or air, or prospect. We cannot distinguish this case from the two cases above cited, of *Atkins v. Bordman* and *Gerrish v. Shattuck*; and are therefore of opinion that the plaintiff has not shown a right to have the passage-way kept open and unobstructed from the ground upward for its full width of five feet.

The provisions in subsequent deeds by Thorndike of other lots abutting on the passage-way do not lead us to any other conclusion; and we are not able to see how the fact that Perkins opened windows, overlooking the way, in his house on the lot north of it, has any material bearing on the case. He could not thereby acquire an easement of light and air. The defendant and his predecessors in title had no right to prevent his opening windows, and their silence cannot justly lead to the inference that the passage-way was laid out for the purposes of light and air, and thus enlarge the grant to the plaintiff.

The question we have discussed is the only one argued by counsel, and we see no reason for disturbing the decree entered by the justice who heard the case.

Decree affirmed.

NOTE BY THE REPORTER. — See note, 54 Am. Rep. 478. "The owner of the fee in the land, over which is a right of way, may erect a building over said way, if in so doing he does not interfere with the right of way. What is included in the ordinary grant of a right of way commonly called an 'alley-way?' The complainant relies on *Kana v. Bolton*, 86 N. J. Eq. 21. So far as the right to an easement entered into the controversy in that case, it was not decided that building over or across it, six feet above the ground, was or

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was not an obstruction. Nor can I find any case which supports the claim of the complainant; but so far as the question has been considered by the courts, the cases are against the complainant. In Massachusetts the owner of an adjoining tenement, who had the fee in the soil over which was a way, built over the way at an elevation of eleven feet. The court (*Gerriah v. Shattuck*, 133 Mass. 285) held that it was lawful for him to do so. See also *Atkins v. Bordman*, 2 Metc. 457. In the case before me it appears that in describing the property, the way is referred to, and that following the description, are these words: 'Together with the appurtenances, and also the free and joint use of said five feet three and a half inch wide joint alley, for ingress and egress forever.' There is nothing to show any special use intended. The usual and ordinary rights conferred upon a grantee can only be taken into account in such case. What are those rights? Only the right of ingress and egress upon the surface of the soil, not beneath the surface, not above the surface at such elevation as he may elect. He could not construct an underground way, nor a drain, nor other openings. He could not construct an elevated way in order to reach his lot or dwelling, or any part thereof. His rights are confined to and upon the surface of the soil. Not so limited are the rights of the owner of the fee. He has only conveyed the right to the use of the surface. All other rights of ownership not inconsistent therewith he retains and may exercise. If he does not interfere with the right of way, he may use the sub-soil, or go beneath the surface for any purpose; and so undoubtedly he may appropriate the space above the surface. Below the surface he has imposed no barrier; and above, none, except the right of way; and with this exception all other rights are as perfect as they can be. Does the erection of a structure over said way, at an elevation of nine or ten feet, interfere with or obstruct the right of the complainant to ingress and egress? I think not. There is nothing in the case to show that when he purchased his lot he intended to engage in any thing that would suffer by the proposed erection; nor that since he has undertaken any thing which cannot so well be done. So that I can find nothing in the present situation, nor in any of the attending circumstances at or since the grant, which calls for the interference of this court.' N. J. Chan. Ct., Oct. 9, 1886. *Sutton v. Groll*. Opinion by BIRD, V. C.

SWASEY V. JAUQUES.

(144 Mass. 135.)

Will — "next of kin."

A testator provided that if any of certain legatees "shall die before my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." One of these legatees died in the life-time of the testator, leaving as his nearest relatives a

brother and three nephews, sons of a deceased brother, all of whom survived the testator. *Held*, that the brother of the legatee was entitled to the exclusion of the nephews.

THE opinion states the case.

H. I. Bartlett, for Richard T. Jaques.

D. L. Withington, for nephews.

FIELD, J. This is a petition by an executor for the construction of a will. It was filed in the Probate Court, and a decree there entered, from which an appeal has been taken to this court, where the cause has been heard by a single justice and reported to the full court.

[Omitting a point of practice.]

By the tenth article of the will, the testatrix gave pecuniary legacies to certain persons; and provided that if any of them "shall die before my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." Matilda Jaques, one of these legatees, died in the life-time of the testatrix, leaving as nearest relations a brother, Richard T. Jaques, and three nephews, sons of a deceased brother, all of whom survived the testatrix and are now living. The question is whether the words "next of kin" in the will mean nearest blood relations, or include all those relations who would take under the statute of distributions.

In England, this question was settled by *Withy v. Mangles*, 10 Cl. & F. 215; *Harris v. Newton*, 25 W. R. 228; *Halton v. Foster*, L. R., 3 Ch. 505. The case of *Withy v. Mangles* has been cited by this court in *Houghton v. Kendall*, 7 Allen, 72, and *Haraden v. Larrabee*, 113 Mass. 430. There are comments upon the case in *Houghton v. Kendall*, but the decision in *Houghton v. Kendall* is in accordance with late English decisions by courts inferior to the House of Lords, and these decisions must be held not to conflict with *Withy v. Mangles*.

In *Houghton v. Kendall*, a testator bequeathed to his daughter Sally the income of \$2,000, which was to remain in the hands of his executors; and provided that at her decease the sum remaining in their hands should be paid "over to the chil-

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dren who may be the surviving heirs of said Sally's body, to be divided in equal shares between them." Sally survived the testator, and died leaving at her death one son and four grandchildren, children of a deceased son. The court say: "When the word 'heirs' is used in a gift of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the person whose 'heirs' they are called." It is unnecessary in the present case to consider under what circumstances the word "heirs" is to be construed to mean distributees of personalty. See *Fabens v. Fabens*, 141 Mass. 395, 399; *Merrill v. Preston*, 135 Mass. 451; *Minot v. Harris*, 132 Mass. 528; *Sweet v. Dutton*, 109 Mass. 589; s. c., 12 Am. Rep. 744. *Wingfield v. Wingfield*, 9 Ch. D. 658; *In re Thompson's Trusts*, 9 Ch. D. 607, and *Keay v. Boulton*, 25 Ch. D. 212, are decisive to the same effect as *Houghton v. Kendall*. The distinction taken between these cases and *Wilby v. Mangles* is that the word "heirs" in itself imports succession to property by death; and as the persons who are the heirs of any one deceased are designated by law — which now is statutory law — the heirs must be either those persons who by law would succeed to the real estate, or those who would succeed to the personal estate, of the person whose heirs they are called, if that person had died intestate; and it is said, that if the property is personal, the inference is that those persons are meant who would succeed to personal estate if the owner had died intestate, and who have been sometimes styled the statutory next of kin, or heirs of the personalty. But it is said that the words "next of kin" do not of themselves import "succession *ab intestato*," and taken alone, mean nothing more than nearest blood relations; and that unless there is something more in the will indicating that the testator intended statutory next of kin, or that the property should be distributed as intestate property, these words must have their customary meaning. Our statute of distributions includes, among those who take, the husband or wife of the deceased, and permits representation.

The words "next of kin" are not used in the chapter of the Public Statutes concerning the distribution of the personal estate of intestates, but are used once in the chapter concerning the descent of real estate, which with certain exceptions regulates the

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distribution of personal estate, and then the words are "next of kin in equal degree." But the words "next of kin" are used in other provisions of the statutes relating to the administration of estates, and apparently sometimes include all persons who take personal property as distributees of an intestate estate, and sometimes all such persons except the husband or wife. Pub. Stats., ch. 125; ch. 130, § 1; ch. 135; ch. 136, §§ 20, 36-28; ch. 143, §§ 12, 13, 20, 23. The context and the subject matter must in each case determine the meaning of the words. There is no general provision that the personal estate of an intestate shall be distributed among the next of kin.

It is certainly difficult to distinguish between the expressions "next of kin," "nearest of kin," "nearest kindred," and "nearest blood relations," and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other. What little recent authority there is beyond that of the English courts supports the English view; and on the whole we are inclined to adopt it. *Redmond v. Burroughs*, 63 N. C. 242. *Davenport v. Hassel*, Basb. Eq. 29; *Wright v. Methodist Episcopal Church*, Hoff. Ch. 202, 213. There is nothing in this will which controls or modifies the meaning of the words "next of kin."

The decree must be reversed, and a decree entered that the legacy of \$500 given to Matilda Jaques be paid to Richard T. Jaques.

The details of the decree may be settled by a single justice, before whom counsel may be heard upon their application to be allowed counsel fees out of the fund. *So ordered.*

ROGERS V. LUDLOW MANUFACTURING COMPANY.

(144 Mass. 186.)

Master and servant — defective machinery — employment of competent servants.

In an action against a manufacturing corporation for injuries received by an employee by reason of a defect in the machine on which he was employed, a request to instruct the jury "that the making of such ordinary repairs as the machine requires, and the keeping of it in order, from day to day, may be intrusted to servants; and if the master employs competent servants for

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that purpose, and supplies them with suitable means, the master performs his duty," is rightly refused, where there is evidence that the servants employed to repair the machine did not use due care in their repairs, or in giving warning of danger. In such a case it should be submitted to the jury whether the defendant had exercised a reasonable supervision over its servants, and over the manner in which the machinery was kept in repair. (See note, p. 75.)

ACTION for personal injuries by negligence. The head-note states the case. The plaintiff had judgment below.

G. M. Stearns, for defendant.

G. Wells & J. B. Carroll, for plaintiff.

FIELD, J. As we construe the charge of the presiding judge, and as we think it must have been understood by the jury, we find nothing in the exceptions that requires comment except the refusal to give the third instruction requested, and the instructions given in place of it. This request was taken from the opinion in *McGee v. Boston Cordage Co.*, 139 Mass. 445, 448, with a slight change. In that opinion it was said that "the making of such ordinary repairs as the use of the machine required to keep it in order from day to day may be intrusted to servants." The request includes all ordinary repairs which the machine requires, as well as those required to keep it in order from day to day.

Since the law was established in *Farwell v. Boston & Worcester Railroad*, 4 Metc. 49; s. c., 38 Am. Dec. 339, that a master is not liable for an injury to a servant caused by the negligence of a fellow-servant, because every servant takes by virtue of his employment the risk of such an injury, the question has been much discussed how far a master can escape responsibility by delegating the management of his business to servants. In that case it was said: "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether for instance the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine. Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an

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incorporated company — are questions on which we give no opinion.”
4 Metc. 92.

Since the decision in *Farwell v. Boston & Worcester Railroad*, it has been established that it is the duty of the master to take reasonable care that suitable machinery be provided, that it be kept in proper repair, and that competent servants be employed and retained.

As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest, that if it is held that these are all fellow-servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery used was defective. To avoid this result, some courts have held the superintendents or managers are not fellow-servants with the men employed to work under them, or that servants employed in one department of the business are not fellow-servants with those employed in another. Other courts have held that they are all fellow-servants, but that the master cannot avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him, and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible.

The tendency of the English courts, before the passage of the Employers' Liability Act, 43 & 44 Vict., ch. 42, was to restrict very much the liability of the master. In *Wilson v. Merry*, L. R., 1 H. L. Sc. 326, 332, it was said by Lord Chancellor CAIRNS: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do." Such a rule makes the liability of the master depend

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largely upon the extent of the supervision which he has undertaken personally to exercise over his business, and recognizes few duties except those which the master has undertaken personally to perform.

The rule of *respondet superior* as applied to cases like the present, the exception of injuries caused by the negligence of a fellow-servant, and the limitations of this exception have been established by courts upon considerations of public policy, as well as of the legal principles which govern cases somewhat analogous. If a master who takes no personal part in the management of his business has any duty to perform toward his servants, it is difficult to say that it is always wholly performed by doing two things, namely by employing competent servants, and by furnishing ample means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and such regulations should be established as will insure the requisite subordination and control, and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. If it is not the absolute duty of the master to furnish suitable machinery, and if he is not held to warrant that the servants he employs to furnish machinery, or to keep it in repair, shall always use reasonable care, then the duty of a master who does not personally conduct his business, if he is under any duty, we think, must be to use reasonable care in the management, and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business.

It is settled in this Commonwealth that all servants employed by the same master in a common service are fellow-servants, whatever may be their grade or rank. *Albro v. Agawam Canal*, 6 Cush. 75; *O'Connor v. Roberts*, 120 Mass. 227; *Walker v. Boston & M. R.*, 128 Mass. 8; *Holden v. Fitchburg R.*, 129 Mass. 268; *McDermott v. Boston*, 133 Mass. 349; *Flynn v. Salem*, 134 Mass. 351; *Mackin v. Boston & Albany R.*, 135 Mass. 201; s. c., 46 Am. Rep. 456.

It is also settled that the master is only bound to use reasonable care in procuring suitable machines, in keeping them in proper

repair, and in hiring and retaining competent servants. The difficult question is what conduct on the part of the master satisfies this obligation. This question was carefully considered in *Holden v. Fitchburg R.*, *ubi supra*. It is there said that the master "is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places and structures in, upon or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. * * * It is difficult, if not impossible, to lay down a more definite rule applicable to all cases. As to switches or turn-tables upon the line of a railroad, the employment of suitable persons to select, construct, or inspect, has been held to satisfy the obligation of the corporation. * * * On the other hand, where a locomotive engine in actual use is imperfectly constructed, or is worn out, it has been held that the fact that the corporation has employed suitable persons to construct it, or to keep it in repair, does not, as matter of law, afford a conclusive defense; but that the question is whether under all the circumstances the corporation, acting by its appropriate officers or agents, has used that diligence and taken those precautions which its duty as a master requires." 129 Mass. 276-278. In that case it was held that there was no evidence that the corporation was negligent even if its servants were negligent, in setting up or using a derrick, but that there was evidence of negligence on the part of the corporation in permitting the derrick to remain for at least ten days by the side of the track.

In *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209; s. c., 46 Am. Rep. 458, and in *Elmer v. Locke*, 135 Mass. 575, many of the cases were reviewed, and the general principle declared in *Holden v. Fitchburg R.* was so applied that in one case the corporation was found not to be liable, and in the other to be liable, to its servant.

In *Lawless v. Connecticut River R.*, 136 Mass. 1, it was held that it was the defendants' duty to furnish a suitable locomotive, and that "it did not necessarily discharge this duty by intrusting it to suitable servants and agents, but was responsible for the negligence or want of ordinary care of such servants and agents in the performance of the duty required of them."

In *Spicer v. South Boston Iron Co.*, 138 Mass. 426, the plaintiff, a servant of the defendant, was injured by the breaking of a hook, and there was evidence that there was a visible crack or flaw in the

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hook, which a careful inspection would have revealed; and it was held that there was evidence of negligence on the part of the defendant corporation.

In *McGee v. Boston Cordage Co.*, *ubi supra*, there was no evidence that the machine was not a suitable one, in good repair, until it became entangled with hemp at the time the plaintiff was using it, and the necessity of remedying this was incidental to the use of the machine.

These decisions show that it is the duty of the master to exercise a reasonable supervision over the condition in which the machinery, structures and other appliances used in his business are kept by his servants, and that he cannot wholly escape responsibility by delegating the performance of this duty to servants; that the negligence of his servants, in repairing or in failing to repair machinery, is not necessarily the negligence of the master; but that it is also to be determined in each case whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants and furnished them with suitable materials, and instructed them to keep the machinery in repair.

As was said in *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 215; s. c., 46 Am. Rep. 458: "The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master may be inferred from it."

We are aware that this rule is somewhat indefinite, and is perhaps not precisely that which generally prevails in the United States. *Northern Pacific Railroad v. Herbert*, 116 U. S. 641; *Benzing v. Steinway*, 101 N. Y. 547.

There was evidence in the case at bar that the worker, at the time the plaintiff was set to work upon it, had been for a long time in a condition which made it dangerous to one picking it while in motion. To put the worker into a safe condition to be picked while in motion, it was necessary to take off the lags which were broken, or had cracks or holes in them, and to put on new lags. The danger was, that if there were cracks or holes in the lags, the pick might get caught, and the hand of the person picking might

be drawn between the rollers. The defendant's servants, whose duty it was to keep the machine in repair, apparently only renewed the lags when the teeth were so far broken or bent that the machine did not do good work, and did not consider that the danger of picking the worker, if there were holes or cracks in the lags, was a reason why new lags should be put on.

The court could not properly give the instruction requested in a case where the evidence tended to show a long continued defect in the machine which rendered it dangerous, and a habit on the part of the defendant's servants to renew the lags only when the machine ceased to do good work, and without regard to its condition as a dangerous machine. It was a question for the jury, whether the defendant used reasonable care in supervising its servants who were employed to repair the machine, and in ascertaining the condition in which its machinery was kept, as well as whether these servants used due care in inspecting the machine from time to time, and in repairing it, or in giving persons using it warning of danger, if the condition of the machine made it dangerous. If these servants used all the care that was reasonably required in keeping the machine in proper condition, the defendant is not liable, unless it knew of the defect and unreasonably neglected to remedy it, or to give notice of the danger. If these servants did not use all the care that was reasonably required, it was for the jury to say whether the defendant had exercised a reasonable supervision over its servants, and over the manner in which the machinery was kept in repair.

We think that the instructions given by the presiding justice were substantially in accordance with this view of the law. The sentence, "It must appear that all these have done their duty," may fairly be taken to mean either that the servants must have used due care in keeping the machine in repair, or if they did not, that reasonable care must have been used in supervising them and the condition in which the machinery was kept. This instruction was not given with reference to the burden of proof, and the only exceptions are "to the instructions given so far as they failed to comply with said requests or were inconsistent therewith." As the third instruction requested, upon the facts in evidence, ought not to have been given without some modification, as the attention of the presiding justice was not called to particular phrases, and as the general tenor of his charge was not misleading, the entry must be,

Exceptions overruled.

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NOTE BY THE REPORTER.—See *Rice v. King Phillip Mills*, post, 80; *Penn., etc., Co. v. Mason*, 109 Penn. St. 296; s. c., 58 Am. Rep. 722; *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575; *Cone v. Del., etc., R. Co.*, 81 N. Y. 206; s. c., 37 Am. Rep. 491; *Murphy v. Boston, etc., R. Co.*, 88 N. Y. 146; s. c., 43 Am. Rep. 420.

Mr. Wood (Master and Servant, § 398), entitles that section: "Not liable for defective appliances when proper person has been appointed to repair." To this he cites *Faulkner v. Railroad Co.*, 49 Barb. 324, and *Warner v. Erie Ry. Co.*, 39 N. Y. 468, cases of a defective bridge; *Merry v. Wilson*, L. R. 1 Sc. & Div. 326; *Hard v. Vt. Cent. R. Co.*, 32 Vt. 478; *Brann v. Chicago, etc., R. Co.*, 53 Iowa, 595; s. c., 36 Am. Rep. 248. He says: "The rule is, that when the master has provided suitable instrumentalities for the particular business—and by instrumentalities is meant all the appliances used in the prosecution of the business, including co-servants, machinery, materials and place—he has discharged his duty to the servant, and is only bound to the duty of ordinary care, that is, such care as a reasonably prudent man would use in the selection of these agencies, and in keeping them in condition; and if in spite of this care on his part an injury occurs, he is not responsible therefor." And he adds, that in case of delegation to incompetent servants, "it must be shown that the master knew, or might have known by the exercise of ordinary care, that such person was in fact incompetent." Mr. Wood however in a note to this section cites several cases leaning in the direction of the principal case: *Brann v. Chicago, etc., R. Co.*, 53 Iowa, 595; s. c., 36 Am. Rep. 448; *Durkin v. Sharp*, 88 N. Y. 225; *Galveston, etc., R. Co. v. Delahunty*, 53 Tex. 206; *Coules v. Richmond, etc., R. Co.*, 84 N. C. 309; s. c., 37 Am. Rep. 630; *Mansfield Coal and Coke Co. v. McEnergy*, 91 Penn. St. 185; s. c., 36 Am. Rep. 662. See also *Davis v. Cent. Vt. R. Co.*, 55 Vt. 84; s. c., 45 Am. Rep. 590, which overrules the *Hard* case, *supra*. The *Delahunty* case is not particularly cogent, because although the injury was caused by an old and worn-out rope, "the defendant introduced no evidence whatever tending to show what precautions, if any, were taken by it to secure good and safe appliances for the use of its employees. The evidence fails to point to any diligence exercised by the company in the discharge of its duty."

In *Durkin v. Sharp*, 88 N. Y. 225, "the defendant requested the court to charge that if the jury believe the track had been inspected within a reasonable time prior to the accident, by a competent inspector of the defendant, and had been by him adjudged to be in safe condition, the plaintiff cannot recover." And the court on review said: "The inspection of the track was a duty of the master. Had such duty been carelessly and negligently performed, even by a competent inspector, the master would still be liable. To excuse him from liability, the track must have been carefully inspected by a competent inspector." On the other hand, in *St. Louis, etc., Ry. Co. v. Gaines*, 46 Ark. 555, where a trackman was injured by a draw-head which the car inspector should have discovered to be defective, *held* that he could not recover from the company. The court said: "But regarding these matters as settled by the verdict, viz.: That there was in fact such a defect as is alleged, and that the plaintiff was duly careful, the question yet remains whether the de-

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defendant is liable on account of such defect. The master is not an insurer of the servant's safety, nor does he guarantee that the machinery tools and instrumentalities he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results. *L. R. and F. S. R. Co. v. Duffey*, 35 Ark. 603; *St. L., I. M. and S. Ry. v. Harper*, 44 Ark. 529.

"The presumption is that the master has done his duty by furnishing safe and suitable appliances for the performance of his work. And when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises. *Shearm. & Redf. Neg.*, § 99; *Thomp. Neg.* 1053; *Wood Mast. and Serv.*, § 882; *Pierce Railroads*, 873, 882; 3 *Wood R. Law*, 1505; *St. L., I. M. & S. Ry. v. Harper*, *supra*; *K. C., S. & M. R. v. Summers*, 45 Ark. 295; *L. R. & F. S. Ry. v. Townsend*, 41 Ark. 388; *Hayden v. Smithfield Man'g Co.*, 29 Conn. 548; *DeGraff v. N. Y. & H. R. R. Co.*, 76 N. Y. 125; *E. St. L. P. & P. Co. v. Hightower*, 92 Ill. 189.

"The court refused a prayer of the defendant, which correctly stated the law on this subject; and the error was not cured by other directions. There is no proof that the railroad company, or any of its employees, had any knowledge of any defects in the coupling apparatus of the car or its fastenings prior to the accident. The car did not belong to the defendant, but to a connecting carrier. It was duly inspected on the same day the accident occurred and pronounced to be road-worthy by being placed in the train. There is no reason to suppose the car inspector was incompetent, or that on this particular occasion he performed his duty carelessly. The plaintiff himself could not say whether the break in the spring was recent or of long standing. The spring might have been broken after the train left Texarkana. There is not a particle of evidence that the defendant omitted any duty which it owed to the plaintiff.

"Now notice of the alleged defect, or what amounts to the same thing, the means of knowledge which the company failed to use, was a material fact which was necessarily involved in the verdict. Consequently, as no testimony was given from which the jury could infer that the company knew, or might by reasonable diligence have discovered the defect in time to remedy it and prevent the casualty, the verdict is not supported by sufficient evidence."

In *Indiana Car Co. v. Parker*, 100 Ind. 181, an action for an injury from a worn-out rope, the defendant was a non-resident corporation, and carried on the factory in question by a general agent and superintendent. A recovery was sustained. ELLIOTT, J., said on the point in question: "It is the duty of the master to provide suitable and safe machinery, reasonably well adapted to perform the work to which it is devoted, without endangering the lives or limbs of those employed to operate it. The master is not bound to use the highest care, nor to secure the latest and most improved machinery, but he is bound to use care, skill and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission. *Unback v. Lake Shore, etc., Ry. Co.*, 88

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Ind. 191, *vide* p. 193; *Boyce v. Fitzpatrick, supra*; *Lake Shore, etc., Ry. Co. v. McCormick*, 74 Ind. 440; *Lawless v. Connecticut River R. Co.*, 136 Mass. 1; *Trask v. California, etc., R. Co.*, 63 Cal. 96; *Payne v. Reess*, 100 Penn. St. 301; *Hough v. Ry. Co.*, 100 U. S. 218; *Railroad Co. v. Fort*, 17 Wall. 553; *Ford v. Fitchburg R. Co.*, 110 Mass. 241; s. c., 14 Am. Rep. 598; *Pateron v. Wallace*, 1 Macq. 748; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Ellis v. New York, etc., R. Co.*, 95 N. Y. 546; *Wilson v. Willimantic, etc., Co.*, 50 Conn. 438; s. c., 47 Am. Rep. 658, *vide* p. 655; *Voaburgh v. Lake Shore, etc., Ry. Co.*, 94 N. Y. 374; s. c., 46 Am. Rep. 148; *Wood Mast. and Serv.* 686; 2 Thomp. Neg. 972; Whart. Neg., § 211.

"The duty which the master owes to the servant is one which he cannot rid himself of by casting it upon an agent, officer or servant employed by him. The distinction between a negligent performance of duty by an agent or servant, and the negligent omission of duty by the master himself, is an important one. Where the duty is one owing by the master, and he intrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform, and if he intrusts it to an agent, and the agent performs it in his place, the agent's act is that of the master. In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is for the occasion, and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow-servant has no application whatever where the agent stands in the master's place. The reason of the rule fails, and where the reason fails, so does the rule itself. The reasons which support the rule are that servants take the risks of the employment upon which they enter, and public policy requires that fellow-servants should 'each be an observer of the conduct of the other.' *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49.

"The first of these reasons completely fails when it is brought to mind that the servant does not assume the risk arising from unsafe and unsuitable machinery and appliances. The second as surely and completely fails when we affirm, as under all the authorities affirm we must, that the duty to provide safe appliances rests upon the master, and not on any servant, for surely servants are not bound to be observers of the master's conduct. It is therefore not at all difficult to clearly discriminate and broadly mark the difference between a case where it is the master's duty, as master, that is neglected, and a case where it is the fellow-servant's duty, as servant, that is negligently performed. A servant has a right, himself exercising ordinary care, to rely upon his master's care and diligence. He is not bound to watch his master as he is his fellow-servant. The rights are reciprocal, the master has his duty as the servant has his. When the master's duty is negligently done, he it is who is guilty of a breach of duty although he acted through the medium of an agent.

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If the master were permitted to escape his duty by shifting it to an agent, the practical result would be his entire absolution from the duty which the law imposes. The law will not permit this result, for it will not permit a duty to be evaded, but will require performance by the person upon whom it has fixed it. A different rule from that stated would, in such a case as this, wholly relieve the master from obligation to his servants, for here the foreign corporation acted by its agents, and none of its chief officers were ever at the factory in Cambridge City. If it cannot be held responsible for the negligence of these agents in selecting, arranging and maintaining this machinery, the result will be that it is wholly absolved from its duty to its agents and servants.

"It is clear upon principle that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty, nor are authorities wanting. In one of our text-books it is said: 'It is important at this point to remember that the master is liable where the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery. A master, as we have already seen, is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the persons by whom out-buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by the capitalist employing only his own servants in the construction of his buildings and machinery.' Whart. Neg., § 232.

"In a thoughtful essay upon this general subject, Judge Cooley says: 'We have seen that in some cases the master is charged with a duty to those serving him which he cannot divest himself of by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitability of the tools, implements, machinery or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence.' 2 South. Law. Rev. (N. S.) 114, see page 123."

The court then quotes from the following cases, all cases of delegation by the master: *Mullan v. Philadelphia, etc., Co.*, 78 Penn. St. 25; s. c., 21 Am. Rep. 2; *Gunter v. Graniteville Mfg Co.*, 18 S. C. 562; s. c., 44 Am. Rep. 573; *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 533; *Flike v. Boston, etc., R. Co.*, 53 N. Y. 549; s. c., 18 Am. Rep. 545; *McCoaker v. Long Island R. Co.*, 84 N. Y. 77; *Brothers v. Cartter*, 52 Mo. 372; s. c., 14 Am. Rep. 424.

The court continued: "Speaking of the duty of the master to the servant, the Supreme Court of the United States said: 'Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.' *Hough v. R. Co.*, 100 U. S. 213, 218; *Wabash, etc., Ry. Co., v. McDaniels*, 107 U. S. 454.

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"The duty of the employer to provide safe machinery and appliances is a continuing one. Thompson says: 'But the master does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. 'It is a duty to be affirmatively and positively fulfilled and performed.' He must supervise, examine and test his machines as often as custom and experience require.' 2 Thomp. Neg. 964. In support of this doctrine the author cites *Warner v. Erie, etc., Ry. Co.*, 39 N. Y. 468; *King v. N. Y. Cent., etc., R. Co.*, 4 Hun, 769; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 531; a. c., 10 Am. Rep. 417; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197; *Illinois Central R. Co. v. Welch*, 53 Ill. 183; *Gohsen v. Texas, etc., Ry. Co.*, 3 Cent. L. J. 882. This is the doctrine of the Supreme Court of the United States, as appears from the decision in *Hough v. Ry. Co.*, *supra*.

"In *Gunter v. Graniteville, etc., Co.*, *supra*, it was said: 'It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives and we think, it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and in safe working order, and if these duties, or either of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates, by whatever name they may be called.' In support of this doctrine the court refers to the cases of *Corcoran v. Holbrook*, 59 N. Y. 517; a. c., 17 Am. Rep. 369; *Brann v. Chicago, etc., R. Co.*, 53 Iowa, 595; a. c., 36 Am. Rep. 243; *Fuller v. Jewett*, 80 N. Y. 46; a. c., 36 Am. Rep. 575. The rule is supported by sound principle. The duty of the master is not at an end when he first equips his factory or mill, but continues as long as there are operatives who are entitled to assume that he will use due care to provide safe machinery and appliances. It would overthrow the rule that the risks which a servant assumes are only such as are incident to the use of machinery selected and maintained by the master with proper care, to deny the validity of our conclusion.

"Ordinary care requires that a master shall take notice of the liability of the parts of the machinery to decay from age, or wear out by use. *City of Indianapolis v. Scott*, 73 Ind. 196; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Bacon*, 96 Ind. 31; *Rapho v. Moore*, 68 Penn. St. 404. It certainly needs no argument to prove that a factory owner must know that a rope, or materials of a similar character, will wear out, and that he has no right to assume that wear and use will not weaken or impair them. Ordinary prudence therefore requires that he should take notice of the liability of such things to wear out, and make provisions for such contingencies. Reason and experience unite in affirming that an owner does not exercise even ordinary care, who gives no attention to the effect upon ropes, belts, timbers or the like, which is produced by the wear of continued use. It would be unreasonable to assert that an owner might entirely disregard the tendency of parts of his machinery to wear out, and intrench himself from liability on the ground that at the outset he had provided safe machinery and appliances."

RICE V. KING PHILLIP MILLS.

(144 Mass. 230.)

Master and servant — negligence — defective machinery — competent co-servants.

The plaintiff, who was employed in the defendant's mill, was injured by a weight which fell from a machine, to which it was attached by a rawhide lacing; the use of the weight being so to operate on a pulley as to regulate the winding of yarn on a bobbin. *Held*, that the court properly ruled that the weight was a part of the machine, and correctly instructed the jury that if they found that the weight, as held up by the lacing, was not a proper machine, and that the defendant knew, or ought to have known, that fact, the defendant was liable if the accident happened while the plaintiff was in the exercise of due care, although the defendant had employed competent persons to attend to the machine.*

ACTION for personal injuries by negligence. The head-note shows the point. The plaintiff had judgment below.

J. M. Morton & A. J. Jennings, for defendant.

J. M. Cummings, for plaintiff.

FIELD, J. The evidence of the manner in which the weight was attached to the machine, of the purpose for which it was attached, and of the effect produced by it in the working of the machine, being undisputed, the court rightly ruled that it was a part of the machine, within the meaning of the law that the defendant was bound to exercise due care in furnishing suitable machines, and in keeping them in proper repair.

There was evidence for the jury that the plaintiff was in the exercise of due care. There was evidence that she did not know, and that it was not her duty to know, that the weight was attached to the chain in an unsafe manner, or that the lacing was, or had become, too weak to support the weight. She knew that the weight was attached to the chain by a raw-hide lacing, but it was not necessarily a part of her duty to decide whether this was a suitable or safe means of hanging the weight, and she may have known nothing of the strength of raw-hide lacings.

* See *Rogers v. Ludlow Mfg. Co.*, ante, 68; *Pennsylvania, etc., Co. v. Mason* (109 Penn. St. 296), 58 Am. Rep. 722.

Rice v. King Phillip Mills.

The difficulty in the case arises from the refusal of the court to give to the jury the last instruction requested by the defendant. It is the duty of the master to exercise due care in employing competent servants, in providing suitable machines, and in keeping them in proper repair, and the master cannot wholly escape responsibility by delegating these duties to a servant. If this could be done, a master might escape all responsibility by employing a competent superintendent to perform all these duties. But there are defects in machinery which are of such a character that the master has been held to perform his duty if he furnishes suitable materials, and employs competent servants, and instructs them to keep the machinery in repair, although the servants neglect to make the repairs, or make them in an improper manner. The master must exercise a reasonable supervision over the manner in which his business is done; but the repairs which machines properly constructed require to keep them in running order may be intrusted to competent servants. They are regarded as incidental to the use of the machines, because they are such as machines in substantially good repair must from time to time need.

Perhaps the whole question is whether the master has exercised reasonable care in employing competent servants, in providing suitable machines and implements, and in doing that part of his business which he has undertaken to do himself, and has exercised a reasonable supervision over his servants in the performance of the duties which he has intrusted to them. This is often a question for the jury. Courts have therefore held that they could not say, as matter of law, that a master was not responsible for injuries occasioned by defective machinery, when the defect was substantial and rendered the machine unfit for use, although it was through the neglect of a competent servant that the machine had not been repaired, and they have also held that when the defect was one that must frequently arise from the use of the machine, and was such that the person employed to superintend the use of the machine should attend to in order to keep it in running order, the master performed his whole duty by furnishing suitable materials and employing competent servants to keep the machinery in repair. These decisions have been made in cases where it appeared that the defect in the machinery was unknown to the master. The general question is what under the circumstances the master ought reasonably to have known and done, and in determining this, the nature

of the defect, the length of time it has existed, and the means taken to remedy it, are important facts. In the present case, the court instructed the jury that the person employed to keep the machine in repair was a fellow-servant with the plaintiff, and that "if the master provides suitable appliances and competent persons to attend to them, he has done his duty. If he provides proper persons to see that his machinery is kept in proper condition to use, and the injury is caused by the negligence of the persons so employed, the master is not liable." These instructions comprise substantially all that is contained in the instruction requested, except that they require that the servants be competent, and that the appliances furnished be suitable. If there was no evidence that the servants of the defendant were incompetent, and we are not certain that all the evidence on this point is contained in the exceptions, still the defendant did not specifically call the attention of the court to this, or ask any ruling upon it; and it was for the jury to say whether the raw-hide lacings furnished were proper appliances, and whether the defendant had used due care in furnishing proper appliances. The court then instructed the jury: "If you find that the weight, as held up by the lacing, was not a proper machine, and that the defendant knew or ought to have known it, the defendant is liable, if the accident happened while the plaintiff was in the exercise of due care." This instruction required the jury to find whether the raw-hide lacings furnished were proper appliances, or whether the particular lacing used was defective, and whether the defendant knew it, or ought to have known it.

The defendant asked for no further instructions upon the nature of the facts, or the circumstances upon which the jury might find that the defendant ought to have known that the machine was defective. If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair and dangerous, it was his duty to see that it was put in proper repair, or to warn those using it of the danger, if they were ignorant of it. *Snow v. Housatonic Railroad*, 8 Allen, 441; *Ford v. Fitchburg Railroad*, 110 Mass. 240; s. c., 14 Am. Rep. 598; *Holden v. Fitchburg Railroad*, 129 Mass. 268; s. c., 37 Am. Rep. 343; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209; s. c., 46 Am. Rep. 458; *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Ellis v. New York, Lake Erie & Western Railroad*, 95 N. Y. 546; *Pantzar v. Tilly Foster Iron*

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Mining Co., 99 N. Y. 368; *Benzing v. Steinway*, 101 N. Y. 547; *Hough v. Railway*, 100 U. S. 213.

Exceptions overruled.

DOOLING V. BUDGET PUBLISHING COMPANY.

(144 Mass. 236.)

Libel — on caterer.

The publication of an article stating that a dinner furnished by a caterer on a public occasion was "wretched," and was served "in such a way that even hungry barbarians might justly object," and that "the cigars were simply vile, and the wines not much better," is not actionable, *per se*.

ACTION for the following libel: "Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better." The defendant had judgment below.

C. B. Southard & R. Bradford, for plaintiff.

W. E. L. Dillaway & H. E. Bolles, for defendant.

C. ALLEN J The question is, whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, furnished or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings and other works of art, music, architecture, and generally of the product of one's labor, skill or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further and attacks the individual. *Gott v. Pulsifer*, 122 Mass. 235; s. c., 23 Am. Rep. 322; *Swan v. Tappan*, 5 Cush. 104; *Tobias v. Harland*, 4 Wend. 537; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Ex. 218; *Young v. Macrae*,

Barton v. White.

3 B. & S. 264; *Ingram v. Lawson*, 6 Bing. N. C. 212. Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libellous, as in *Bignell v. Buzzard*, 3 H. & N. 217.

The old case of *Fen v. Dixe*, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of disparagement at least as strong as those used by the present defendant in respect to the plaintiff's dinner, wines and cigars; but the action failed for want of proof of special damage.

In *Evans v. Harlow*, 5 Q. B. 624, 631, Lord DENMAN, C. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be 'false, scandalous, malicious and defamatory,' that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff, in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion, provided a very poor dinner, vile cigars and bad wines. Such a charge is not actionable, without proof of special damage.

Judgment on the verdict.

BARTON V. WHITE.

(144 Mass. 261.)

Patent — right to, in insolvency.

Letters-patent of the United States, owned by an insolvent debtor, pass to his assignee in insolvency.*

BILL to compel assignment of letters-patent. The head-note states the point.

* To the same effect, *Petition of Keach*, 14 R. I. 571.

J. E. Mayndier, for defendants.

C. H. Drew, for plaintiff.

O. ALLEN, J. We have no doubt that it was the intention of the legislature, in enacting the statute relating to insolvent debtors, to include patents as property which should pass to the assignee by the assignment. This was so declared in *Carver v. Peck*, 131 Mass. 291, though the point was not essential to the decision. There is nothing in the nature of a patent to prevent it from so passing. *Ager v. Murray*, 105 U. S. 126. But it has been considered that an assignee in insolvency does not acquire a title merely by force of the assignment, and without a conveyance by the debtor, the reason given being that the statutes of the United States contemplate an instrument of transfer, signed by the owner of the patent, and recorded in the patent office. *Ashcroft v. Walworth*, Holmes, 152.

It is now contended, on the part of the defendants, that since a patent cannot be attached, or seized on execution, it is "by law exempt from attachment," within the meaning of the Public Statutes, chapter 157, section 44, and therefore, by the express terms of the statute, does not pass to the assignee. But the words above quoted do not mean that all property which cannot be attached or seized on execution shall not pass by the assignment, but only such property as is by statute exempted from attachment. Section 46 of the statute provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him." A patent clearly is property which the owner could have lawfully sold, assigned, or conveyed, and thus falls within the term of section 46, though it could not have been taken on execution upon a judgment against him. The policy of the insolvent act is to vest in the assignee all the property of the debtor, of every description, except such as is exempted by statute from attachment. It has never been considered that the fact that a debtor's property was of such a character that it could not be seized on execution excluded it from the operation of the insolvent laws. Such a construction indeed has not been contended for, so far as we know; and cases assuming the contrary are numerous. *Bassett v. Parsons*, 140 Mass. 169; *War-*

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ren v. Warren Thread Co., 134 Mass. 247; *Davis v. Newton*, 6 Metc. 537, 543; *Smith v. Chandler*, 3 Gray, 392, 396; *Burnside v. Merri-
ck*, 4 Metc. 537. In *Stearns v. Harris*, 8 Allen, 597, it was said that "the words of the insolvent law, describing and enumerating the property and rights of property which pass by the assignment, are large and comprehensive, and have always been liberally construed by the court, so as to include every valuable right in property, real or personal, not clearly excepted, whether legal or equitable, absolute or conditional, which could have been enforced by the debtor in any kind of judicial process."

The defendants further contend, though without laying very much stress upon this ground of argument, that the State has not the power to enact a statute which has the effect to pass a title to letters-patent of the United States; but we have no doubt upon this point.

Under section 74 of the Insolvent Act, it is the duty of an insolvent debtor to make and execute such deeds and writings, and do all such other lawful acts and things as the assignee at any time reasonably requires, and as are necessary and useful for confirming the assignment; and the assignee is entitled to the aid of a court of equity in his endeavor to acquire the title to the patent in controversy, the facts alleged in the bill being admitted to be true.

Decree for plaintiff.

POST V. TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY.

(144 Mass. 341.)

Corporation — foreign — suit for discovery.

A corporation of another State, having there obtained a judgment against another corporation of that State, may maintain a bill in equity here against the officers of the debtor corporation, for discovery of the names of its stockholders and of the number of shares held by each, if the officers reside in this Commonwealth and the books of the corporation are kept here, in order, by a suit in the other State, to enforce a personal liability of such stockholders.

BILL for discovery. The opinion states the case.

W. G. Russell & J. Fox, for defendants.

J. B. Warner, for plaintiff.

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FIELD, J. This is a bill in equity, brought by a corporation organized under the laws of the State of Ohio, and it seeks discovery only. There is no doubt that such a bill is within the jurisdiction of the court. Pub. Stats., chap. 151, § 2, cl. 14; chap. 198, § 16; Stat. 1883, chap. 223, § 10.

The statutory provisions whereby parties are made competent witnesses, and are permitted in suits at law or in equity to obtain from each other the discovery of facts and documents by filing interrogatories, have not taken away the jurisdiction of the court to entertain bills of discovery, although they may affect the exercise of this jurisdiction in reference to suits brought in our own courts. These provisions are not inconsistent with the statutes relating to bills of discovery, nor with the general equity jurisdiction of the court over such bills; and the remedies afforded by interrogatories, or by calling the parties as witnesses, are manifestly inapplicable to the present suit, as no relief is sought in it.

Although in *Aultman's Appeal*, 98 Penn. St. 505, the courts of Pennsylvania apparently took full jurisdiction over an Ohio corporation and its stockholders, to enforce the liability of the stockholders under the statutes of Ohio, we assume, as was substantially conceded by all the parties at the argument, that our courts would decline to exercise any such jurisdiction. See *Erickson v. Nesmith*, 15 Gray, 221; s. c., 77 Am. Dec. 78, and 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 438; *Smith v. New York Ins. Co.*, 14 Allen, 336; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349.

The object of this bill is to obtain from the defendants a discovery of the stockholders of an Ohio corporation, in order that the plaintiff may institute a suit in the courts of Ohio against the corporation and its stockholders, to collect a judgment which the plaintiff has obtained against the corporation. The liability of the stockholders is imposed by the Constitution and statutes of Ohio. The Ohio corporation has been made a defendant to the bill here, but has not appeared in the suit, and no service has been made upon it, and we are not aware that any effectual service could have been made upon it. The other defendants are alleged to be the officers and directors of the corporation who reside in Massachusetts, and they have been personally served with process, and have appeared. The case would perhaps have been presented more satisfactorily if the bill had contained a fuller statement of the law of Ohio, and had set out the statutes of that State in terms, because

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the law of Ohio is a fact, although the construction of its statutes is for the court, and whatever knowledge we may have of that law beyond the allegations of the bill, we cannot use it for the purpose of deciding the case.

It appears by the bill that in the proceedings in the Ohio courts, the corporation and all its stockholders who are liable must be made parties defendant; that the stockholders who are liable are not only those who appear on the books of the corporation to be stockholders, but those who are equitable owners of the stock; and that each of such stockholders is liable, in addition to his stock, to an amount equal to the stock "for the payment of the debts and liabilities of the corporation." The bill does not allege that those only who were stockholders on the day when the judgment was rendered, or at any other time, are liable, but it asks that the defendants may be compelled to disclose the names and residences of all persons who were stockholders, legal or equitable, before or on the day when the judgment was rendered, and of all persons who have become stockholders since that day, with the amount of stock held by each, and "how long each held the same." The bill does not allege that the defendants at any time were stockholders, or that the law of the State of Ohio requires that the officers and directors of a corporation shall be stockholders. It does not allege that the courts of Ohio have not power to compel disclosure from the defendants, if they could be brought before the courts of that State, or what, if any, provisions are made by the laws of that State for the purpose of ascertaining the stockholders who are liable. The bill alleges that "there is no officer of the defendant corporation, or person, or book, or paper, within the jurisdiction or control of any of the courts of Ohio, from whom or from which the information sought by this bill, or any part thereof, can in fact be obtained; * * * that all of said officers," by which is meant all of the defendants, "reside in Boston, within the jurisdiction of this court; that the said railroad company has its only office for the transfer of stock in said Boston; that all the books for the transfer of stock, and all books which show the shareholders in said railroad company, are in said Boston, and are in the possession or under the control of the aforesaid officers, or some of them; that a majority of the board of directors of said railroad company reside in said Boston; and that all the directors, and all the other principal officers of said railroad company, reside outside the State of Ohio."

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Taking all the allegations of the bill together, we think it appears that the sole difficulty which the plaintiff encounters is that the courts of Ohio are powerless to compel the disclosure it seeks, because all the officers of the corporation reside without that State, and all the books of the corporation are in the possession of the officers, or of some of them, and are also without that State.

The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is *quasi ex contractu*. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation. It is for the people or the legislature of each State to determine to what extent, if at all, the stockholders of corporations created by the laws of that State shall be liable for the debts of such corporations. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member; see *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516; s. c., 50 Am. Rep. 328; and although this policy has now been changed, and the liability restricted to specific cases, and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our laws that even citizens of Massachusetts, who voluntarily have become stockholders in Ohio corporations, should not be held to perform the obligations imposed by those laws. The difficulty which courts find in dealing with foreign corporations in matters relating to their internal affairs and management, the impossibility of compelling persons to perform their obligations, unless either the bodies or the property of such persons can be attached, the intimate relations existing between the States of the United States, and the well-known fact that corporations are frequently organized by the citizens of one State under the laws of another and the principal offices of the corporations kept in a State other than that of their creation, all induce us to give whatever aid the principles of law permit to persons who are endeavoring to enforce the obligations which attach to stockholders in foreign corporations.

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Our statutes, in cases where the stockholders are liable for the debts of a Massachusetts corporation, require that the clerk or other officer having charge of the records shall furnish to a judgment-creditor of the corporation a certified list of the names of the stockholders. Pub. Stats., chap. 106, §§ 63, 83 ; see chap. 105, § 26. And if the officers and records were beyond the reach of the process of our courts, the aid of courts of other jurisdictions might be necessary to make the remedy provided by our statutes effectual.

This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created. The procedure is in the nature of a partial liquidation of the affairs of a corporation under the statutes of the State which created it, and it resembles the proceedings under our statutes for enforcing the liability of the officers or members of manufacturing corporations, or for winding up insolvent banks and mutual insurance companies. If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the State under which the corporation is created, the courts of that State alone can afford complete and effectual judicial relief.

The question is whether the plaintiff's bill states a case in which "a discovery may be lawfully required according to the course of proceedings in equity." Pub. Stats., chap. 151, § 2, cl. 14.

It is conceded that the primary object of discovery was to obtain admissions from a party which could be used as evidence against him, and that the general rule was that discovery could not be had from a person who had no interest in the litigation, and who could be called as a witness. In suits against a corporation, as it answered under its common seal, and not under oath, the practice was early established of making one or more of its officers or members co-defendants, and of compelling them to make disclosure of such facts within their knowledge as the corporation, if a natural person, could have been compelled to disclose, although their answers could not be used as evidence against the corporation. Their answers enabled the plaintiff to ascertain, in advance of a trial, what the facts within their knowledge were, and to propound proper in-

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interrogatories to them or to other persons as witnesses. *Wright v. Dame*, 1 Metc. 237.

In *Queen of Portugal v. Glyn*, 7 Cl. & Fin. 486, one Soares had brought an action against Glyn and others on certain bills of exchange, and the defendants in that action brought a bill in equity against Soares and the queen of Portugal for discovery to aid them in the defense of the action, and alleged, among other things, that Soares held the bills as the agent of the queen. The queen demurred to the bill, and the demurrer was allowed, on the ground that discovery could not be had from persons interested in the subject of a pending action at law who were not parties of record in that action; and a distinction was taken between bills for relief and discovery, and bills for discovery only. It was however, there said by Lord Chancellor COTTENHAM, that "the cases of officers of corporations stand on principles entirely peculiar to themselves, and have obviously no application to the present case."

In bills for relief, persons other than the principal defendants, who were connected with the subject of the suit, or are in possession of documents which concern the litigation, have sometimes been made parties for the purpose of obtaining a discovery of facts and documents from them, and discovery is also had from the defendants of the names of other persons who are interested in the subject of the suit, if it is necessary to make them parties in order that the decree may be complete and effectual; and in bills in equity to collect a judgment obtained at law, on which an execution has been returned unsatisfied, discovery has been had of the property of the defendants, and incidentally of persons in whose possession the property is, in order to subject it to the payment of the plaintiff's judgment. Under recent British statutes, this jurisdiction is exercised liberally by interrogatories to parties, or by orders in the suit. *Dixon v. Fraser*, L. R., 2 Eq. 497; *Sherlock v. Disney*, 13 Ir. Eq. 233; *Hambrook v. Smith*, 17 Sim. 209; *Rawlins v. Dalton*, 3 Y. & C. 447; *Macclesfield v. Davis*, 3 V. & B. 16; *Hancock v. Lablache*, 3 C. P. D. 197; *Bovill v. Cowan*, 15 W. R. 608; *Meador v. Isle of Wight Ferry Co.*, 9 W. R. 750. See also *Bay State Iron Co. v. Goodall*, 39 N. H. 223.

The present case must be determined by the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them, or to their

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property, in order to discover who the persons are against whom he may proceed for relief.

It seems to be settled that a bill will lie against a corporation and its officers, to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone. *McComb v. Chicago, St. Louis & New Orleans Railroad*, 19 Blatchf. 69; *Costa Rica v. Erlanger*, 1 Ch. Div. 171; *Glasscott v. Copper Miners' Co.*, 11 Sim. 305; *Moodalay v. Morton*, 1 Bro. C. C. 469; *MacGregor v. East India Co.*, 2 Sim. 452; *Bolton v. Liverpool*, 1 Myl. & K. 88. See *Colgate v. Compagnie Francaise du Telegraph*, 23 Fed. Rep. 82.

It is settled that a bill of discovery may be maintained, to aid the plaintiff in a suit which he intends immediately to bring, as well as in a suit already sought, if the bill discloses a cause of action, and the difficult question is, under what circumstances such a bill may be maintained for the purpose of ascertaining the proper parties against whom the suit should be brought.

In *Mayor of London v. Levy*, 8 Ves. 398, upon demurrer to the bill, the argument was upon the question whether the facts stated would subject the defendants to an indictment or a penalty, and the demurrer was allowed, on the ground that the bill did not "state who are the persons against whom the action is to be brought," nor was it a bill stating "such circumstances as may enable the court, which must be taken to know the law, and therefore the liabilities of the defendants, to judge; but stating circumstances, and averring, that you have a right to an action against the defendants or some of them." But the facts of that case were not such as required the court to overrule the old cases of *Standen v. Bullock*, Toth. (ed. 1671) 71; *Heathcoate v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443, and *Moodaly v. Moreton*, 2 Dick. 652, nor were these cases noticed in the opinion. Whether these decisions would now be followed in like cases need not be determined. The recent decision of Vice-Chancellor HALL in *Orr v. Diaper*, 4 Ch. Div. 92, shows that under some circumstances, discovery may be had for the purpose of ascertaining the persons against whom the plaintiff may bring a suit, although he does not allege that he has a cause of action against, or intends to sue, the persons who are the defendants in the proceedings for discovery. See *The Murillo*, 28 L. T. (N. S.) 374, and *Hoppeck v. United New Jersey Railroad*, 12 C. E. Green, 286, and 1 Stew. (N. J.) 261.

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It is clear that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses, and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendants. See *Twells v. Costen*, 1 Pars. Sel. Cas. 373. But when a plaintiff has a cause of action against persons who are defined, either by statute, or by their relations to property or to a business by the management of which the plaintiff has suffered injury, and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons from their agents in charge of the property or business, and the decisions recognize that this may sometimes be done.

In the present case, it is the duty of the corporation to pay the plaintiff's judgment, if it have sufficient assets; a part of its assets for that purpose is the liability of its stockholders; the corporation acts only through its directors and other principal officers, and it is necessary that the plaintiff, in order to enforce the liability of the stockholders, and thus obtain satisfaction of its judgment, should bring suit against the corporation and all its stockholders, and the plaintiff, except by discovery, cannot ascertain who these stockholders are. We can have no doubt that if the principal suit could be brought here, the plaintiff could, either in that suit or by a bill for discovery, obtain from the officers of the corporation a discovery of what, from the books of the corporation or their own official knowledge, they could disclose of the names and residences of the stockholders who were liable to contribute toward the payment of the plaintiff's judgment. A court of equity would not permit the remedy intended by the statutes to be made unavailing by the refusal of the corporation, acting through its officers, to disclose who its stockholders were, even if the officers were not expressly required by statute to disclose them.

But it is argued by the defendants, that this court will not compel discovery in aid of a foreign tribunal; and they rely upon *Bent v. Young*, 9 Sim. 180, and *Reiner v. Salisbury*, 2 Ch. Div. 378. *Bent v. Young*, was apparently decided on three grounds, first, that it did not appear that the plaintiff could not obtain relief by filing a bill for that purpose in the English courts; secondly, that it did not appear that the court in Surinam could not compel the discov

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ery sought; and thirdly, that in the contemplation of the Court of Chancery, every foreign court is an inferior court," and therefore the case was within the rule that the Court of Chancery will not compel discovery in aid of an action in the inferior courts of England, and it was suggested, that although the defendant was a resident of England, and had never been resident in Surinam, "*non constat* therefore" that he "may not be in Surinam when the suit there is commenced." The first two reasons are cogent; the last reason and suggestion do not require serious consideration. *Reiner v. Salisbury* was decided, on the grounds that the suit for the recovery of the land must be brought in India; that the defendant, the secretary of state for India in council, was in India as well as in England, and could be sued in India; and that the plaintiff would have the same right to discovery from him in India as in England.

In *Mitchell v. Smith*, 1 Paige, 287, a bill was maintained in the Court of Chancery of New York for the discovery of matters in aid of the defense of an action at law brought in Connecticut.

In *Burgess v. Smith*, 2 Barb. Ch. 276, it is said: "This court has jurisdiction, and will entertain a bill of discovery in aid of the prosecution of a civil suit, in a sister State, or in a foreign tribunal, or in a court of the United States."

In modern times it is the policy of States to afford aid to foreign tribunals in the taking of testimony to be used in suits pending there. Our statutes make provision for compelling a witness to give his deposition in a cause pending in a court in "any other State or government." Pub. Stats., chap. 169, § 44; see U. S. Stat. of March 3, 1863; *Ponsford v. O'Connor*, 5 M. & W. 673.

The jurisdiction which courts of equity exercise as ancillary to that of other courts is not, either on principle or authority, confined to other courts of the same State. A receiver has been appointed to collect or to preserve property pending litigation in a foreign court, and an injunction has been granted against transferring property until the title could be determined in a foreign court. *Transatlantic Co. v. Pietroni*, Johns. Eng. Ch. 604.

In the present case, the fact that all the officers and all the books of the corporation are without the State of Ohio makes it, as the bill alleges, impossible for the plaintiff to obtain the discovery in the Ohio courts; and, as we think the plaintiff is entitled to discovery from the officers of the corporation, we are of opinion that a

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bill for discovery may be maintained here, where the officers and books of the corporation are. The defendants demur to the whole bill, and if the plaintiff is entitled to any of the discovery it seeks, the demurrer must be overruled. We think that at least a case is stated for the discovery of the names and residences of the persons who, as stockholders, are liable by the laws of Ohio to contribute toward the payment of the plaintiff's judgment, and of the amount of stock held by each, so far as this appears on the books of the corporation, or has become officially known to the defendants while they were acting as such officers. *McComb v. Chicago, St. Louis & New Orleans Railroad, ubi supra.*

Demurrer overruled.

WOOD V. GRAVES.

(144 Mass. 305.)

False imprisonment — abuse of legal process.

An action for false imprisonment will lie for the misuse or abuse of regular legal process.

THE opinion states the case. The plaintiff had judgment below.

B. Wadleigh and P. E. Tucker, for defendants.

A. W. Boardman, for plaintiff.

C. ALLEN, J. The three counts of the declaration are treated by the counsel for the defendants as being counts respectively for malicious prosecution, for false imprisonment, and for abuse of criminal process; and the trial appears to have proceeded on that ground. No question as to the form of the declaration has been raised. The court correctly ruled, upon the request of the defendants, that upon the evidence, the plaintiff could not maintain an action for malicious prosecution, the prosecution not having been brought to a termination. The principal questions arise upon the other requests by the defendants for instructions.

The court declined to rule, that upon the evidence, the plaintiff could not maintain an action for false imprisonment against either of the defendants. No action would lie for false imprisonment by

reason of what was done in pursuance of the warrant of the governor in the extradition of the plaintiff from Massachusetts to New Hampshire, or of what was done in pursuance of any lawful precept issued upon the indictment in New Hampshire; but if acts were done in excess of what was authorized, and if the process of the law was abused, the remedy might be by an action for false imprisonment. The court therefore properly declined to adopt the language of the defendants' second request, and all the rights of the defendants in respect to this were saved by the course of the instructions in relation to the wrongful use of process already commenced.

There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if after an arrest upon civil or criminal process the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong. It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. *Esty v. Wilmot*, 15 Gray, 168; *Malcom v. Spoor*, 12 Metc. 279; s. c., 46 Am. Dec. 675. This rule however is somewhat technical and is hardly applicable to others than the officer himself. But the principle is general and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is *Grainger v. Hull*, 4 Bing. (N. C.) 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the d:-

rections of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope. In *Page v. Cushing*, 38 Me. 523, the same doctrine was held applicable to the abuse of criminal process. *Holley v. Mix*, 3 Wend. 350, is to the same effect, and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a person accused, by operating upon his fears, though the person was in the custody of the officer under a valid warrant, issued upon a charge of felony. The case of *Baldwin v. Weed*, 17 Wend. 224, was an action for false imprisonment. The plaintiff had been indicted in New York; he was arrested in Vermont and carried to New York for trial. The defendant Weed procured the requisition, was present at the arrest, and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much in excess of the debts. The action for malicious prosecution failed, but the court (NELSON, C. J.) declared that an action of trespass, assault and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the process; and intimated to the plaintiff to amend his pleadings accordingly. See also *Carleton v. Taylor*, 50 Vt. 220; *Mayer v. Walter*, 64 Penn. St. 283. On similar grounds an officer becomes responsible in damages for abuse of process, or as trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care; *Adams v. Adams*, 13 Pick. 384; or who stays too long in a store where he has attached goods; *Rowley v. Rice*, 11 Metc. 337; *Williams v. Powell*, 101 Mass. 467; s. c., 3 Am. Rep. 396; *Davis v. Stone*, 120 Mass. 228; or who keeps a keeper too long in possession of attached property; *Cutter v. Howe*, 122 Mass. 541; or who places in a dwelling-house an unfit person as keeper, against the owner's remonstrance. *Malcom v. Spoor*, *ubi supra*.

In various other cases, where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are *Mullen v. Brown*, 138 Mass. 114; *Hamilburgh v. Shepard*,

119 Mass. 30; *Coupal v. Ward*, 106 Mass. 289; and *O'Brien v. Barry*, 106 Mass. 300; s. c., 8 Am. Rep. 329. The case of *Hackett v. King*, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In *Taylor v. Jacques*, 106 Mass. 291, the question arose in another form, the action being on a promissory note, in defense to which the defendant alleged that his signature was procured by duress.

In examining the instructions of the learned judge to the jury in the present case no error is found. He made a careful discrimination between the remedy for a malicious prosecution and that for a malicious abuse of process in the manner of executing it. He instructed them explicitly that no damages should be given for any thing which occurred before the process was used at all by the officer, but only for what occurred after it began to be used upon the plaintiff, and after it began to be wrongfully used for the purpose of collecting the defendant's debt, and so used with their participation, by their direction, or under their influence. He told them also, in effect, that it must be proved that the defendants, by influence which they were able to exert, or otherwise, actively used the prosecution as a means of getting their debt; and this he afterward explained and enforced by saying that it must be an influence which they brought to bear in some way upon those in charge of the proceedings. Under these instructions the jury could not properly hold the defendants responsible for merely setting the criminal law in motion, and arresting the plaintiff, and holding him in custody until his discharge; but only for some distinct act or omission, which amounted to a misuse or abuse of the process after it had issued, some indignity or oppression beyond the mere fact of arrest and detention, some separate pressure to compel him to make the settlement.

[On another point]

Exceptions sustained.

Blaisdell v. Ahern.

BLAISDELL V. AHERN.

(144 Mass. 303.)

ChamPERTY and maintenance — agreement for contingent fees.

A contract by which an attorney depends on the contingency of success for payment for all services, and the client agrees to furnish evidence and pay all actual costs, and that the attorney shall be entitled to large and liberal fees, not to exceed fifty per cent of the amount collected, is not champertous nor void for maintenance.

ACTION for attorney's services. The opinion states the case. The defendant had judgment below.

J. L. Thorndike & N. Morse, for plaintiff.

J. Bennett & E. O. Cooke, for defendants.

W. ALLEN, J. This is an action by an attorney at law to recover for professional services. The only question argued is, whether the services were rendered under a contract illegal for champerty or maintenance, so that no compensation can be recovered for them.

The parties were residents of this Commonwealth. The defendants were children of a father who had been a stranger to his family for years. They earned their living as domestic servants, and one or both of them had lived in the family of which the plaintiff was a member, and had known him from boyhood. They heard that their father had died in New Hampshire, leaving property there, and consulted the plaintiff in regard to recovering it, and gave him a power of attorney to collect their shares of it. They had no means except their earnings, and were unable to defray the expense of legal proceedings. The plaintiff orally agreed with them to take charge of their case upon the terms that they should furnish money for all actual expenses, and that in the event of success, he should charge more for his services than if he was sure of his pay in the outset. The plaintiff rendered services under this agreement.

The defendants' case was tried in the Probate Court in New Hampshire, and a decision rendered adverse to them, and an appeal was taken to the Supreme Court. Pending this appeal, there was

some difference between the defendants and the counsel employed in New Hampshire, and he withdrew from the case, but was persuaded by the plaintiff to return; and in consequence, a written agreement was signed by the defendants, which recited that they had retained the plaintiff and authorized him to retain counsel in New Hampshire, and that "said counsel and attorney are to depend upon the contingency of success for the fees for all services rendered in and about said prosecution." The contract also contained the agreement that the plaintiff and the counsel employed "shall in view of the uncertainty of the result in their payment be entitled to very large and liberal fees, in no event to exceed fifty per cent of the amount collected by them, and that we [the defendants] will furnish all the evidence and pay all the actual costs in the prosecution of said claims." The defendants afterward, without notice to the plaintiff, employed other counsel, and on trial, recovered \$9,300.

According to the terms of this agreement, the plaintiff could unquestionably have maintained an action against the defendants for his fees, if successful in the suit. In that event, he "is to be entitled to very large and liberal fees," for which he would have a right of action against the defendants. This is inconsistent with a champertous agreement, an essential element of which is a sharing in the fruits of the litigation. There was no agreement that the plaintiff should receive a share of the amount recovered as compensation for his services. It is immaterial that the avails of the suit were the means or the security on which he relied for payment, if it was to be payment of a debt due from the defendants. *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Metc. 489.

Ackert v. Barker, 131 Mass. 436, and *Belding v. Smythe*, 138 Mass. 530, are cases of champerty, where a part of the amount recovered was to be received in compensation for services, and there was to be no personal liability. Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. *Tip'ey v. Coffin*, 12 Gray, 420; *Scott v. Harmon*, 109 Mass. 237; s. c., 12 Am. Rep. 685; *McPherson v. Cox*, 96 U. S. 404; *Christie v. Sawyer*, 44 N. H. 298; *Anderson v. Radcliffe*, E., B. & E. 806, 817.

We do not see any thing in the agreement which renders it void for maintenance. In a sense, a lawyer may be said to maintain

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another in a suit when he gives his advice or services, as formerly it would have been maintenance for a layman to do so; but such acts have long since ceased to be unlawful, and it would now nowhere be held to be in itself unlawful for a lawyer to give his services to prosecute a suit, with the understanding that his services are to be free unless success shall give to his client the ability to pay him, and that in that case he will expect liberal fees. There may be circumstances in which such a contract would be meritorious; and there may be circumstances in which it would partake of the worst evils of maintenance. Under what circumstance a contract of that nature might be held void as against public policy, we need not consider. The contract under consideration was nothing more than an agreement by the plaintiff to give his services without charge if the suit should not be successful, and an agreement by the defendants to pay large and liberal fees if successful; and we know no authority and no reason in public policy, why under the relations and circumstances of the parties, it was not a lawful contract, which they had a right to enter into. We think that the ruling, as matter of law, that the action could not be maintained, was wrong.

New trial granted.

PACKARD V. RYDER.

(144 Mass. 469.)

Fishing — public — right of — trespass.

A person may, from a boat, enter upon and walk and fish along the uninclosed flats of another, in the sea, between high and low-water mark, and within one hundred rods of the upland.

TRESPASS. The defendant landed upon the plaintiff's flats, from his boat, at low tide, and walked along the narrow strip of land between high-water mark and low-water mark, within one hundred rods of the upland, and fished there, although forbidden by the plaintiff. The waters facing said shore are the open, navigable, tidal waters of Buzzard's bay. The plaintiff had judgment below.

C. F. Chamberlayne, for defendant.

H. P. Harriman, for plaintiff.

HOLMES, J. It is now well settled that there is a public right to take shell-fish on the shore and flats below high-water mark and within one hundred rods of the upland, until the flats are inclosed by the proprietors. *Weston v. Sampson*, 8 Cush. 347; *Dunham v. Lamphere*, 3 Gray, 268, 271; *Lakeman v. Burnham*, 7 Gray, 437; 9 Gray, 526, 527; *Commonwealth v. Bailey*, 13 Allen, 541, 542; *Proctor v. Wells*, 103 Mass. 217; *Commonwealth v. Manimon*, 136 Mass. 456, 458. But the right to take shell-fish is asserted on the single ground that the general right of fishing extends to and includes it. *Weston v. Sampson* and *Lakeman v. Burnham*, *ubi supra*. The cases cited show too plainly for further discussion, that if there is a right to go upon flats and to disturb the soil for clams, *a fortiori* there is a right to pass over them for fishing, in the stricter sense of the word. The defendant did not set nets, or create any permanent obstruction, as in *Duncan v. Sylvester*, 24 Me. 482; s. c., 41 Am. Dec. 400.

Exceptions sustained.

GULLINE V. LOWELL

(144 Mass. 491.)

Negligence — contributory — child playing on highway — "traveller."

A child seven years of age, while walking in the evening beside his father on a plank footway upon a bridge, which the defendant city was bound to keep in repair, stepped aside to clasp in sport a post forming part of the bridge, and fell through a hole in the planking, eleven inches square, near the post, not known to either the boy or his father, into the water and was drowned. The father knew of the boy's intention to clasp the post, and did not forbid his doing so. *Held*, not contributory negligence *per se*. (*See note*, p. 104.)

ACTION for the loss of life of the plaintiff's intestate by negligence. The head-note states the case. The plaintiff had judgment below.

W. F. Courtney, for defendant.

G. F. Richardson, for plaintiff.

W. ALLEN, J. The only question in these exceptions is, whether the court erred in refusing to rule that there was no evidence of due care on the part of the plaintiff or of his intestate. There was

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evidence of the conduct of the parties, and that is evidence upon the question of due care. There was certainly direct evidence tending to show, that until the boy left his father's side, an instant before the injury, both were in the exercise of ordinary care, and from which, unless controlled by other evidence, a jury might have inferred that there had been no negligence on the part of either of them. The manner and circumstances in which the plaintiff's intestate left his father's side form part of their conduct, and of the facts from which their care or negligence is to be inferred, unless they were of such a character as to be obviously and necessarily inconsistent with ordinary prudence.

The court cannot say, as matter of law, that for a boy seven years of age to step aside and clasp a post he is passing, or for his father, in whose care he is, not to forbid him to do it, was negligence. A jury would be justified in finding, that under the circumstances, they were acts natural and to be expected in boys and their fathers of ordinary prudence.

It is argued that the boy was making an unlawful use of the highway, and that the father was negligent in allowing it, and several cases are cited where persons injured were debarred of their remedy because making a use of the highway for which it was not intended, but as applied to the case at bar, they afford very little aid to the defendant.

It was decided in *Blodgett v. Boston*, 8 Allen, 237 (which is affirmed in *Tyghs v. Lowell*, 119 Mass. 472), that a boy using the highway solely for the purpose of playing could not recover of the city for an injury caused by a defect in the way. But the court said: "We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because at the time of the occurrence of the accident, he was also engaged in some childish sport or amusement. There would exist in such a case the important element that the person injured was actually travelling over the way. But this element is wholly wanting in the case at bar. We have here the naked case of an appropriation of a portion of a public street to a use entirely foreign to any design or intent to pass or repass over it for the purpose of travel within the meaning of the statute. It is to this precise case that we confine the expression of our opinion."

In *Lyons v. Brookline*, 119 Mass. 491, it was held that a child could not recover, who while sitting playing upon the sidewalk was injured by the act of a third person.

In *Stickney v. Salem*, 3 Allen, 374, it was held that a person could not recover for injuries caused by the breaking of an insufficient railing, occasioned by his leaning against it, while lounging upon a sidewalk.

In *Britton v. Cummington*, 107 Mass. 347, the plaintiff recovered for damages to his carriage and horses, although he had left his carriage and was engaged in picking berries by the side of the road. The court say: "There can be no doubt that a traveller on the highway may stop his horse, alight from his carriage, and employ himself, while out of his carriage, in acts that have no connection with his journey or its purpose. Such a position and such employment for a reasonable time would not of itself deprive him of his rights as a traveller."

In *Hunt v. Salem*, 121 Mass. 294, a boy, on his way home, crossed the street to look at toys in a shop window, and stood looking at them four or five minutes, and was injured as he turned away to resume his walk. It was held that he could recover.

In the case at bar, the boy was a traveller, and did not cease to be one when he stepped aside for an instant to clasp in play a post in the highway, and almost in his path. The act was a natural and ordinary incident of travelling.

Judgment for the plaintiff on the finding.

NOTE BY THE REPORTER.—In *Cassida v. Oregon Ry. & Nav. Co.*, Oreg. Sup. Ct., Mch. 7, 1887, it was held that it was not contributory negligence in young children, frightened by cattle while picking berries near a railroad, to run upon a trestle to escape them. See note, 49 Am. Rep. 601; *Hussey v. Ryan*, 64 Md. 426; s. c., 54 Am. Rep. 772.

In *Miller v. Penn. R. Co.*, Sup. Ct. of Penn., Feb. 14, 1887, a child thirteen years old, being late for school, started on a run, and thinking some one was calling her, turned partly round and fell into a sewer built by the defendant, and temporarily open for cleaning, and without watchmen or workmen present, and without guard or rail. A nonsuit was affirmed by an equally divided court.

In *Oil City, etc., Bridge Co. v. Jackson*, Penn. Sup. Ct., it was said: "We are now brought face to face with the question whether a bridge company is bound to maintain such a structure as to prevent the possibility of an accident to a child. A venturesome boy, in his natural love of sport, will explore every nook and recess of a bridge, climb upon the timbers, and manage in some way to get through every hole large enough for his body to pass, and is as

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likely to get down on the piers or upon the roof as anywhere else. The case at bar furnishes an illustration of this. The boy who met with this sad mishap was not content to walk upon the carriage-way, which was safe for all, but insisted upon walking upon a round gas-pipe placed some distance above the floor, notwithstanding the remonstrance of his younger brother, who, child as he was, saw the danger. Of course no blame is imputed to the boy for this. It was childlike, and perhaps the very thing I might have done myself at his age, but the question is, has the bridge company been guilty of such neglect as to be liable to the boy's father for his death? Some little of the responsibility for accidents to children ought to remain upon the parents, whose duty is to look after them and preserve them from danger. It must not be overlooked that this suit was brought by the father for the loss of his boy. He was in the habit of crossing this bridge daily, perhaps several times daily, as his house was on one side of the river and his office on the other. He must have known the condition of the bridge, and may be presumed to have considered it safe, else he would not have given the permission on the day in question, as he had often done before, to cross it unattended. It is hardly possible that he had not seen these openings again and again, but he also knew that the bridge was perfectly safe for travel in the ordinary way, while a child might be injured there, as he might have been injured almost anywhere, by courting danger in walking in dangerous places. Upon careful consideration of the case, we are unable to see any such negligence on the part of the defendant company as to render them liable in this action. As before observed, it was a safe bridge for the ordinary purposes of travel. The child who was killed was not using it in the ordinary way. He was walking upon the gas-pipe, where he ought not to have been, and which was so dangerous that his younger brother remonstrated with him and warned him to get off. It is not necessary to impute negligence to the child; it is sufficient that he was injured, not as the result of the use of the bridge, but as the consequence of his venturing, in his childish recklessness, where no one, child or adult, had any business to be."

KINNEEN V. WELLS.

(144 Mass. 497.)

Elections — constitutional law — naturalized voter — registration.

A statute providing that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization," is unconstitutional.*

THE opinion states the case.

* See *White v. Commr's, etc.* (18 Oreg. 817), 57 Am. Rep. 20.
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C. T. Russell, Jr., for plaintiff.

C. J. McIntire, for defendants.

DEVENS, J. The case at bar is an action of tort against the registrars of voters in the city of Cambridge to recover damages for wrongfully refusing, as the plaintiff alleges, to register him as a voter for the State election of 1886. The judge who presided at the trial in the Superior Court sustained the demurrer to the plaintiff's declaration, and reported the case for the determination of this court.

The case raises but a single question, although one of much importance. The defendants refused to register the plaintiff because he had been naturalized within thirty days previously to his application for registration. They were fully justified in so doing, under Stat. 1885, chap. 345, § 7, if the provisions of this section are constitutional. This section enacts that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization."

By naturalization, the plaintiff became *eo instanti* a citizen of the United States, and therefore a citizen of the State of his residence. By the fourteenth article of the Amendments of the Constitution of the United States, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The right or privilege of voting is a right or privilege arising under the Constitution of each State, and not under the Constitution of the United States. The voter is entitled to vote in the election of officers of the United States by reason of the fact that he is a voter in the State in which he resides. He exercises this right because he is entitled to by the laws of the State where he offers to exercise it, and not because he is a citizen of the United States. *United States v. Anthony*, 11 Blatchf. 200. What are the rights of citizens of the United States as such, and not of citizens of particular States, need not be here considered. They have repeatedly been discussed and defined. *Corfield v. Coryell*, 4 Wash. C. C. 371; *Paul v. Virginia*, 8 Wall. 168; *Ward v. Maryland*, 12 Wall. 418, 430; *Slaughter-House* cases, 16 Wall. 36.

The qualifications of voters are fixed by State legislation. The requisitions as to ownership of property, citizenship, sex, and residence, in connection with the right of voting, vary with the Constitutions or laws of the several States. However unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each State to define the qualifications of its voters is complete and perfect, except so far as it is controlled by the fifteenth article of the Amendments of the Constitution of the United States, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

The question whether section 7, Stats. 1885, chap. 345, is constitutional, must be decided by determining whether this legislation is in conformity with the Constitution of this Commonwealth, or whether it adds any thing to the qualifications which the voter is thereby required to possess, and thus interferes with the enjoyment of the rights with which this Constitution invests him.

The third article of the Amendments of the Constitution of Massachusetts, adopted in 1821, is as follows: "Every male citizen of twenty-one years of age and upward, excepting paupers and persons under guardianship, who shall have resided within the Commonwealth one year, and within the town or district, in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid by himself, or his parent, master, or guardian, any State or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this Commonwealth; and also every citizen who shall be, by law, exempted from taxation, and who shall be, in all other respects, qualified as above mentioned, shall have a right to vote in such election of governor, lieutenant-governor, senators and representatives; and no other person shall be entitled to vote in such elections."

A reading and writing qualification was established in 1857, by article 20 of the Amendments of the Constitution. But this it will not be necessary to consider in the present discussion.

The qualifications of voters are thus defined with clearness and precision; without the possession of these, the citizen or inhabitant cannot exercise the privilege of voting, and as whoever possesses

them is by the Constitution entitled to this privilege, legislation cannot deprive him of it. By the Constitution, chap. 1, § 1, art. 4, full power and authority are given to the General Court "from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof." To the provisions of the Constitution all legislation is thus made subordinate, and it cannot add to nor diminish the qualifications of a voter which that instrument has prescribed. *Blanchard v. Stearns*, 5 Metc. 298, 301; *Williams v. Whiting*, 11 Mass. 424, 433. "This provision of the Constitution (article 3 of the Amendments), being irrepealable by any act of ordinary legislation, must be obeyed and carried into effect according to its plain intent and meaning, as far as that can be ascertained." *Opinion of Justices*, 5 Metc. 591, 592.

The plaintiff, according to the allegations of his declaration, possessed, when he offered himself for registration, all the qualifications of a voter required by the Constitution. Any legislation by which the exercise of his rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary, in order that the rights of the proposed voter may be ascertained and proved, and thus the rights of others (which are to be protected as well as his own) guarded against the danger of illegal voting. The Constitution, while providing for the qualifications of voters, contemplates that equal and reasonable rules will be made by legislation as the method of exercising the privilege, and also that somewhere and at some time, under proper regulations, there will be an inquiry whether those offering to vote possess the requisite qualifications. This inquiry involves an investigation of various facts, as those in regard to the proposed voter's age, sex, residence, payment of taxes, etc. It is not an unreasonable provision that all persons entitled as voters shall be registered as such previously to depositing their ballots, and if the legislature deems that such an inquiry could not proceed concurrently with the actual voting or election, and both be conducted in a deliberate and orderly manner, it is not unreasonable that it

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should provide that such an inquiry should terminate before the election actually commences, at a previous time sufficiently long to make proper preparation therefor.

The plaintiff in the case at bar does not contend that the legislature has not the right to make any reasonable, uniform and impartial regulation of the mode of exercising the right of suffrage, and also of ascertaining the qualifications of voters. He denies that section 7 of the statute under discussion is of this character.

The leading case, not only in this Commonwealth, but in the whole discussion that has taken place in this country in regard to the right of legislatures to provide for judging the qualifications of voters, and for regulating the exercise of their privileges by them as these are prescribed by the Constitutions of the States, respectively, is *Capen v. Foster*, 12 Pick. 485; s. c., 23 Am. Dec. 632. It was there held that the Statutes of 1821, chap. 110, and 1822, chap. 104, providing for a registration of voters in Boston, and requiring that previously to an election the qualifications of voters should be proved, and their names be placed on an alphabetical list or register, were not to be regarded as prescribing a qualification in addition to those which by the Constitution entitled a citizen to vote, but only as reasonable regulations of the mode of exercising the right of voting which it was competent for the legislature to make. But while it is held to be within the proper limits of legislative power to provide suitable regulations for exercising the right of suffrage in a prompt, orderly, and convenient manner, the court, speaking through Chief Justice SHAW, was careful to add: "Such a construction would afford no warrant for such an exercise of legislative power, as under the pretense and color of regulating, should subvert or injuriously restrain the right itself. * * * It (the Constitution) fixed the qualifications of voters with precision, and left all the rest to be regulated by law. * * * The Constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must at some time be had by those who are to decide on them. * * * If then the Constitution has made no provision in regard to the time, place and manner, in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of ex-

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exercising the right in relation to which it is competent to the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."

If section 7, chapter 345 of the Statutes of 1885, were general in terms, and allowed no person to register as a voter until he had possessed the requisite qualifications for a period of thirty days, it would be difficult to maintain its constitutionality. It would still provide for adding another qualification to those required by the Constitution, as much as if the period of domicile within the town or the Commonwealth, required by the Constitution before voting, were extended to a longer period. *State v. Williams*, 5 Wis. 308; *Quinn v. State*, 35 Ind. 485. The Constitution does not provide that the qualifications it requires shall be possessed by the voter for any period before the election, nor has it ever been held that this was necessary. To add this requirement before one can be registered as a voter, is certainly to increase the qualifications. *Kilham v. Ward*, 2 Mass. 236; *Bridge v. Lincoln*, 14 Mass. 367; *Humphrey v. Kingman*, 5 Metc. 162, 165.

In reply to an inquiry by the House of Representatives, as to whether one who had been, but had ceased to be, a pauper, must have ceased to be such for any definite period before he could exercise the right of suffrage, it was said by this court: "It is no more required that the voter shall have ceased to be a pauper, or under guardianship, a year or six months before the election, than that he shall have been a citizen, or of age, during a like period. It has never been doubted that minors, having the other requisite qualifications, become qualified to vote immediately upon arriving at full age. And by uniform usage, recognized and approved in an opinion given to the honorable house last year, persons otherwise qualified, who have been naturalized at any time before the election, have been deemed entitled to vote. The necessary conclusion appears to us to be, that by the third article of Amendment of the Constitution of the Commonwealth, the disqualification of pauperism or guardianship, like that of alienage or nonage, is not required to have ceased to exist for any definite period of time, in order to entitle a man actually free from every such disqualification, and duly qualified in point of residence and of payment of taxes, to exercise the right of suffrage." *Opinion of Justices*, 124 Mass. 597.

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. Nor if such a law were general, is it easy to see how it could be defended upon the ground that it was a reasonable regulation for the purpose simply of ascertaining qualifications and determining whether an applicant actually possessed them. Every system of registration of voters contemplates that the registration will be completed, and that the list of voters will be prepared, before voting actually commences. No system would be just that did not extend the time of registration up to a time as near that of actually depositing the votes as would be consistent with the necessary preparation for conducting the election in an orderly manner and with a reasonable scrutiny of the correctness of the list. While cases may be imagined where the right to vote might depend on a somewhat complicated inquiry, ordinarily the facts on which it depends are simple and susceptible of rapid investigation. Because a difficult inquiry is possible, to provide that all citizens proving themselves to possess the requisite qualifications as voters should not be allowed to register as such for thirty days thereafter, and thus be obliged to show in addition that they had possessed them for that length of time, might be held an unreasonable regulation in regard to the exercise of the privilege of suffrage. In many instances the right to vote might itself accrue, as by expiration of time, by payment of taxes, etc., within the thirty days which precede the registration.

But serious as these objections would be to the constitutionality of a general law applicable to all classes of citizens, it is not necessary now to consider them, as the section of the statute in question presents a difficulty even more serious. It undertakes to prevent a single class of citizens, namely, those who are naturalized, possessing all the qualifications established by the Constitution of the Commonwealth, from exercising the right with which that Constitution invests them, for a period of thirty days, by forbidding the registrars of voters to register them during that period. All citizens must stand equal before the law, and the statute, assuming them to be citizens, imposes this prohibition upon them as citizens of a specified class. A statute regulating the exercise of the right of suffrage, or the ascertainment of the qualifications of voters, must not only be reasonable in its character, but uniform and impartial in its application. If it were possible to impose a period of probation upon all qualified citizens before they were entitled to exercise the privilege, it certainly is not possible under the Con-

stitution to select a single class and impose it on this class alone. "A registry act," says Mr. McCrary in his work on Elections, § 8, "which should undertake to require a longer residence, prior to the time of voting, than that required by the Constitution, or which should require the payment of taxes not required to be paid by constitutional provision, or which should impose upon a particular class of citizens conditions and requirements not required of all others, would be void."

It was suggested at the argument, that the section of the statute here in question might be upheld as a reasonable regulation to protect the public from possible fraud in obtaining certificates of naturalization, and that the delay of thirty days before naturalized citizens are permitted to register allows this investigation. But the board of registrars is not competent to pass upon the question whether a certificate of naturalization was erroneously granted, nor can such a certificate be thus attacked before them collaterally. The only question upon this part of their inquiry into the qualifications of the applicant is whether he is in fact the person named in the certificate he produces, if such certificate be itself properly authenticated. It is a question of identity solely.

No argument in favor of the constitutionality of the section can be founded upon any peculiarity in the situation of naturalized citizens, which renders an inquiry in regard to their qualifications different from similar inquiries when applied to all other citizens. The regulation which it assumes to make is partial, and calculated injuriously to restrain and impede, in the exercise of its rights, the class to which it applies, in that it denies to this class, for the period of thirty days, the exercise of a right which the Constitution has conferred upon it. There is no warrant for this within the just and constitutional limits of the legislative power, which permits reasonable and uniform regulations to be made as to the time and mode of exercising the right of suffrage, and as to the ascertainment of the qualifications of voters. We must therefore pronounce section 7 of the Statute of 1885, chapter 345, to be unconstitutional.

It is not contended by the defendants that the action cannot be maintained, unless the statute in question is constitutional. See *Kilham v. Ward*, *ubi supra*; *Lincoln v. Hapgood*, 11 Mass. 350, 353; *Blanchard v. Stearns*, *ubi supra*; *Larned v. Wheeler*, 140 Mass. 390.

The case is to stand for trial, and the entry will be,

Demurrer overruled.

Train v. Boston Disinfecting Co.

TRAIN V. BOSTON DISINFECTING CO.

(144 Mass. 523.)

Constitutional law—police regulations—board of health—disinfecting rags.

A regulation of the board of health of a city, passed under legislative authority, and ordering "that on and after this date all rags arriving at this port from any foreign port shall, before being discharged, be disinfected under the supervision of an officer of this board, and in a manner satisfactory to this board," is not unreasonable nor unconstitutional. (*See note, p. 116.*)

REPLEVIN. The head-note states the point. The plaintiff had judgment on demurrer.

L. D. Brandeis & S. D. Warren, Jr., for plaintiffs.

R. D. Smith & C. A. Prince, for defendant.

DEVENS, J. [Omitting minor and statutory considerations.] The plaintiffs further urge, that the regulation is void, as trenching upon the domain of Congress in its power "to regulate commerce with foreign nations." The plaintiffs rely much on the case of *Railroad v. Husen*, 95 U. S. 465, in which a statute of Missouri, which forbade the driving or conveying into the State, within certain periods, of any Texan, Mexican or Indian cattle, was held unconstitutional. But this decision most fully recognizes the right of a State to pass reasonable quarantine or inspection laws, as being clearly within the police powers necessary for its protection. The act in question was an exercise of the highest power over the subject of transportation, namely, its entire destruction; but in holding this to be beyond the police powers of the State, Mr. Justice STRONG, who delivered the opinion of the court, observes that the police power "would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive." He further unhesitatingly admits "that a State may pass sanitary laws, laws for the protection of life, liberty, health or property within its borders;" that "it may prevent persons and animals suffering

under contagious or infectious diseases, or convicts, etc., from entering the State;" and that "for the purpose of self-protection it may establish quarantine, and reasonable inspection laws."

So far from the regulation in question interfering with any legislation of the United States, or any regulation of its executive departments, the circular of the treasury department of December 22, 1884, and the circular of June 10, 1885, show that the construction by that department, at least, is quite otherwise. The circular of 1884 directs that "no old rags, except those afloat on or before January 1, 1885, * * * shall be landed in the United States * * * from any foreign country, except upon disinfection at the expense of the importers, as provided in this circular," and prescribes certain processes which will be considered satisfactory, and "will entitle them to entry, and be landed in the United States upon the usual permit of the local health officer." The circular of June 10, 1885, assigns as the reason for the withdrawal of the previous circular the fact, that "under existing laws no general regulations can be legally framed whereby the disinfection of old rags can be accomplished in foreign ports to the satisfaction of the several health authorities;" revokes previous circulars concerning the disinfection of imported old rags; provides that when imported from foreign countries, they shall only be admitted to entry upon production of permits from the health officers at ports of importation, and adds, "vessels carrying old rags, arriving at any United States quarantine, will be detained by the quarantine officers, and held subject to the order of the proper health authorities at the port of destination." The treasury department of the United States, so far from treating the regulations of local health officers as an interference with the rights or the legislation of the United States, transfers to the regulations, as made in different localities by the respective health officers, the whole subject of the disinfection of foreign imported rags. The regulations made by the board of health do not infringe the power of Congress to regulate commerce; they are strictly police regulations, and as such, may be passed under the authority of the legislation of the Commonwealth.

It is further the contention of the plaintiffs, that the regulation of the board of health is invalid, in so far as it seeks to impose the expense of disinfection upon the owner, without a hearing; and that as no method is provided by law for reviewing, by appeal to a jury or otherwise, the action of the board of health, whether this

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action was taken under its general regulation or was a special examination of this particular cargo, it cannot determine whether the plaintiffs are liable for the expense of disinfection; and further, that even if the order may be valid to the extent of protecting the board from an action of tort for its interference, to render the plaintiffs liable for these expenses the answer should show, and the defendant must prove, that there was reasonable ground to believe that the rags were dangerous to the public health. The plaintiffs rely much on *Salem v. Eastern Railroad*, 98 Mass. 431, where it was held that while the board of health would not be liable in tort for its action in removing, without notice or hearing, an alleged nuisance, if no nuisance actually existed, the expense attendant on the action of the board could not be recovered from the owner of the property. The case then before the court was one where a structure, otherwise lawful, had, as was alleged, become a nuisance by the mode in which it had been constructed, so as to set back stagnant water upon adjacent lands. It belongs to that class of cases where trades otherwise lawful become nuisances by the offensive or filthy manner in which they are conducted. *Belcher v. Farrar*, 8 Allen, 325; *Sawyer v. State Board of Health*, 125 Mass. 182. But there can be no doubt of the right of the legislature to pronounce, under its police power, certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision, because they do not provide compensation to the individual whose liberty to keep or do them is restrained. It may forbid entirely the exercise of certain trades noxious or offensive, or trades which it holds to be such, or permit it under such safeguards as it may prescribe; it may forbid certain articles, as gunpowder, to be stored near habitations; it may regulate the height of buildings; and it may provide that these things may be regulated by ordinance or by-laws of the respective cities or towns, or controlled by their authorities. It may determine when that which is otherwise property shall cease to be such, if kept contrary to law. *Commonwealth v. Alger*, 7 Cush. 53; *Fisher v. McGirr*, 1 Gray, 1; s. c., 61 Am. Dec. 381; *Commonwealth v. Tewksbury*, 11 Metc. 55; *Baker v. Boston*, 12 Pick. 184; s. c., 22 Am. Dec. 421; *Vandine, Petitioner*, 6 Pick. 187; s. c., 17 Am. Dec. 351; *Watertown v. Mayo*, 109 Mass. 315; s. c., 12 Am. Rep. 694. Where any thing is declared a nuisance by legislation, it is not competent for a party to show that it is not in fact one. The owner or keeper of

intoxicating liquor proved to have been kept for unlawful sale cannot show that such keeping is not a nuisance in fact, when the legislature has declared it to be one. Rights of property are not indeed to be invaded under the guise of police regulations for the preservation of public order, the protection of public health, or to guard against threatened nuisances. If it appears that the real object and purposes of the regulation are other than these, courts will interfere to protect the just rights of the citizen in his property.

Quarantine laws are a familiar exercise of the police power of a State. Their enactment is within its lawful province, and the making of regulations for their enforcement has always been intrusted to subordinate boards. Even if it be conceded, as it has been often contended, that whenever Congress shall undertake to provide a general system of quarantine, or shall confide the execution of such a system to a national board of health, or to local boards, as may be found expedient, all State laws will be abrogated, at least so far as the two are inconsistent — until this is done the laws of the State are valid. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455. The board of health is invested by the legislature with the power to make regulations necessary for the health and safety of the inhabitants, extending to all persons, goods and effects arriving in vessels; it may determine that certain articles, on account of their liability to convey infection and the impossibility of ascertaining their history and where they have been originally collected, shall always be subjected to disinfection, at least externally in the bales in which they are imported, and that such a precaution is necessary before they are delivered to the importers for distribution among the inhabitants. This is a reasonable regulation, made under the police power of the State, which the board is executing. No legislation having provided that all expenses incurred on account of goods under quarantine laws shall be paid by the owner, is it competent for the owner, as a defense to this claim, to show that the goods did not require disinfection, and could not have transmitted disease, if they were of the class concerning which the regulation had been made?

Demurrer overruled.

NOTE BY THE REPORTER.—In *Town of Greensboro v. Ehrenreich*, Supreme Court of Alabama, July 11, 1887, a legislative charter conferred upon a town power “to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious or contagious diseases, and to preserve the

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health of the inhabitants of the same." The town authorities passed an ordinance "that it shall be unlawful for any person to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-clothes in said town," excepting from the effect of said act articles not imported, and not used by persons having infectious diseases. *Held*, that the ordinance was invalid, being beyond the power conferred by the legislature, and that it was an illegal restraint of a lawful trade. The court said: "The legislature has undoubted power to authorize—and the authority conferred is ample to pass ordinances on the enumerated subjects—the prevention of the introduction of infectious or contagious diseases, and the preservation of the public health. Ordinances having for their object the protection of the health of the inhabitants, which is one of the principal purposes and most important duties of municipal governments, are generally regarded as police regulations, subject to which the individual holds his rights of liberty and of property. Presumptions will be indulged in favor of their necessity, propriety and validity, and when not unreasonable, nor partial, nor oppressive, nor inconsistent with the legislative policy of the State, they should and will be sustained. Considered a part of a system of police regulations in aid of the preservation of the public health, the courts will not interfere with, or set them aside, unless the power has been manifestly transcended. By the grant of power, the character and special provisions of the ordinances are largely left to the discretion and judgment of the corporate authorities—'deemed necessary or proper'—not however an absolute power to pass any ordinances which they may perchance judge necessary or proper; not to be exercised capriciously, but with regard to the circumstances, the object to be accomplished, and the existing necessity. Notwithstanding the grant of power is general,—'to pass and enforce ordinances deemed necessary and proper'—ordinances passed under the power must not be unreasonable, partial or unfair; must not be in restraint of trade, nor contravene the general laws and public policy. It will not be presumed that the legislature intended to clothe the municipal government with power to dispense with the requisites to a valid ordinance. The power will not be enlarged by intendment. And though the necessity and propriety of a particular ordinance is primarily of legislative determination, its character, whether reasonable, impartial and consistent with the State policy, are questions for the court. 1 Dill. Mun. Corp., §§ 819, 825, 829; *Intendant & Council of Marion v. Chandler*, 6 Ala. 899; *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642.

"The general statutes provide quarantine as the means to prevent the introduction of infectious or contagious diseases. To this end any town or city may establish a quarantine ground; the corporate authorities may, from time to time, prescribe the quarantine to be observed by all vessels arriving within the harbor or vicinity; may extend such regulations to all persons, goods and effects in such vessels, and may compel any person coming into town by land, from a place infected with a contagious disease, to perform quarantine, and be restrained from travelling until discharged. Code 1876, §§ 1507-1512. The policy of the statutory provisions is the regulation of trade and travel by temporary restraint, not extending beyond the occasion and scope of the neces-

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sity—self-defensive, which is the limitation on the police power of the State imposed by the Federal Constitution. *Railroad Co. v. Huson*, 95 U. S. 435. The State cannot confer upon the subordinate agencies of the government powers which it does not possess and cannot exercise. The general grant in the act of incorporation, it will be presumed, had reference to these and kindred regulations. We do not mean that the corporate authorities may not adopt and provide other and additional regulations, but that they should be in accordance with the spirit and policy of the general statutes.

"The professed object of the ordinance, as shown by the preamble reciting the recommendation of the officers and members of the board of health, is to protect the health of the community. While unquestionably the municipal government may pass sanitary ordinances for the preservation of health within its limits; may prevent articles of merchandise or others which have been used by persons or in places infected with contagious disease from being brought into the town; may establish quarantine and reasonable inspection regulations, and provide for disinfecting or destroying the germs of disease as far as practicable, and it may be, for obtaining satisfactory assurance that such articles have not been exposed to an infectious or contagious disease—the power cannot be carried beyond unless it is necessary for protection. It will not be controverted that second-hand or cast-off garments, blankets, bedding and bed-clothes are not *per se* introductive of infectious or contagious diseases, and that a lawful business in selling or dealing in them may be carried on without danger to the public health. They become dangerous by reason of the nature of previous use, condition, or exposure. This is virtually admitted by the proviso to the ordinance, which excepts from its operation the sale of the specified articles not imported, and that have not been used by a person having an infectious disease. The operation of the ordinance reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful trade, by permanently prohibiting the importation, selling or otherwise dealing in the enumerated articles, though they may not have been used by persons or in districts infected with such diseases. Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some time and in some places it is infected with trichina, or other kind of food because liable to adulteration. That the ordinance is founded on the fear and apprehension of possible danger, and not on its existence, is shown by the unequal discrimination between articles imported and not imported. We cannot regard it a legitimate exercise of the power conferred by the act of incorporation. *Weil v. Ricard*, 24 N. J. Eq. 169; *Barling v. West*, 29 Wis. 307; *Dunham v. Rochester*, 5 Cow. 462; *Mayor, etc., of Mobile v. Yulle*, 8 Ala. 137."

SNOW V. ALLEY.

(144 Mass. 546.)

Contract—for benefit of party and third person—part performance—rescission.

If A. delivers to B. bonds for two distinct considerations, the first for the benefit of a third person, but effecting advantage to A., and the second for A.'s own direct benefit, and B. performs the first but not the second, A. cannot, without returning the benefit, rescind the contract, and maintain conversion for the bonds, although B. when he entered into the contract, fraudulently intended not to perform the second consideration, and although the benefit received by A. from the performance of the first consideration is of such a nature that it cannot be returned.

THE opinion states the case.

G. O. Shattuck, H. P. Harriman and W. H. Monroe, for plaintiff.

R. G. Ingersoll, J. M. Morton and H. M. Knowlton, for defendant.

DEVENS, J. This is an action of tort in the nature of trover for the conversion of one hundred and fifty Postal Telegraph bonds, of the par value of \$1,000 each. The plaintiff seeks to maintain the action on the ground that the bonds were obtained from him by fraud. The facts as they appear by the defendant's bill of exceptions are as follows:

In the summer of 1881 the plaintiff, with certain persons named Roberts and Cummings and others, organized in New York a corporation called the Postal Telegraph Company. The original capital was \$30,000. At the time of the organization of the company the plaintiff was interested in and the owner of certain patents appertaining to telegraphy, and was in possession of a bond for a deed of a certain factory situated at Ansonia, Connecticut, belonging to Wallace & Sons, and used for the purpose of manufacturing a patent telegraphic wire formed by the deposit of copper around a steel core, to which the plaintiff's patents related. The sum of \$90,000 had been paid by the plaintiff's associates toward the purchase of this factory, in consideration of which the bond had been given. No part of this sum had been contributed by the plaintiff. The Postal Telegraph Company was organized for the purpose of acquiring the factory and patents, a system of tele-

graphy invented by Professor Gray, called the Harmonic, another system called the Leggo-Automatic, and to build a telegraph line from Chicago to New York for the purpose of testing these inventions, which it was believed, if successful, would revolutionize telegraphy and furnish a much cheaper system than the one in use.

At the time of the organization of the company, the plaintiff was one of the organizers, and a member of the company. For the purpose of acquiring these patents and properties, and raising the money to build the line to Chicago, and between all important cities in the United States, it was agreed between the parties in interest, including the plaintiff, but not the defendant, in the fall of 1881, that the capital stock should be increased to \$21,000,000, and that the property should be mortgaged to the Farmers' Loan and Trust Company, of New York, to secure the payment of \$10,000,000 of bonds of the par value of \$1,000 each, to be issued by the Postal Telegraph Company. The vote to increase the capital stock and authorize the issue of the bonds was not actually passed until March 9, 1882, after the defendant had become interested in the corporation.

The enterprise was substantially at a stand for want of means, when on February 25, 1882, Roberts, Cummings and others, with the knowledge of the plaintiff, visited the defendant at Washington, in order to enlist him in the scheme, and to get him to invest his money and use his influence in favor of the company, the parties relied on to furnish funds to carry on the postal telegraph enterprises having declined to go further. This was the first connection which the defendant had with the promoters of the Postal Telegraph Company, although he had previously become interested in the Harmonic system. The defendant at this interview agreed orally to come into the enterprise, and help carry out the arrangements previously made with the plaintiff and others, if on investigation it appeared favorable, and satisfactory arrangements could be made. Subsequently, on March 7 and 8, an interview was held at New York, between the plaintiff, the defendant, Roberts, Cummings and others, in which the defendant finally agreed to come in and use his efforts in behalf of the enterprise, and to subscribe \$100,000 to a construction company to be formed for the purpose of building a line to Chicago, and to lend the Postal Telegraph Company, \$100,000, and more if necessary (Roberts subscribing and lending an equal amount), and to use his efforts to advance, equally with

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Roberts, the money necessary to complete the payment due from the Postal Telegraph Company for the factory, which was then supposed to be about \$260,000, but which, by agreement with Wallace and sons, was afterward reduced to \$160,000, and interest; to advance to Professor Gray, or for his account, what money was necessary to free the Harmonic system from certain liens and pledges to which it was subject, and to put it into the Postal Telegraph Company free from such liens and pledges.

There was evidence tending to show that the one hundred and fifty bonds which are the subject of this suit were given to the defendant by the plaintiff as a *bonus* to induce the defendant to come into the enterprise and do the above things, and for all the advantage he was going to be to the Postal Telegraph Company, and for the risk which he was to incur, and that the agreement on the part of the defendant to do the above things was the consideration which induced the plaintiff to give the defendant the bonds. There was no evidence tending to show that the defendant lost any money or made any money by reason of his doing any thing which he promised to do, or which he did in connection with the Postal Telegraph Company, or by his connection with these enterprises.

The plaintiff testified that he declined to give the bonds for the foregoing considerations solely, but that it was further agreed that no bonds should be sold till the line was completed to Chicago, and that the defendant would buy thirty-two bonds of the plaintiff, and pay him fifty cents on the dollar for the same, and lend him \$20,000 on other bonds than the thirty-two or the one hundred and fifty aforesaid, and that this agreement was part of the consideration for the one hundred and fifty bonds. The making of this last agreement was denied by the defendant, who testified that he never intended to lend the plaintiff any money on bonds, or buy any of the plaintiff's bonds, as the plaintiff had testified, because he never promised to do so. The things which the defendant and those associated with him were to do were relied upon to enhance the value of the bonds and stock, and there was evidence offered by the defendant tending to show that what he did do enhanced the market value of the stock and bonds of the Postal Telegraph Company.

The defendant did not contend, and there was no evidence tending to show, that he had lent or otherwise given any money or other property directly to the plaintiff for the one hundred and fifty bonds; but the defendant contended that the consideration

for the same was the advantage which the defendant was to be to the Postal Telegraph Company, the things he was to do for it, the advances and subscriptions he was to make, the risk incurred thereby, and the enhanced value of the bonds and stock which would result to the plaintiff. The success of the Postal Telegraph Company, and the value of its bonds and stock, depended on its ability to purchase the factory at Ansonia and to build the line to Chicago.

There was no dispute that the defendant fully performed all the agreements made by him, in consideration of which he had received the one hundred and fifty bonds now in controversy, unless he also agreed to lend the plaintiff the sum of \$20,000, and to purchase of him the thirty-two bonds at not less than fifty cents on the dollar, fraudulently intending not to do so. As the agreement, in regard to the loan and purchase of bonds, was distinctly denied by the defendant, it was a denial by necessary inference that he fraudulently intended not to keep such an agreement.

The defendant by his eighth and ninth requests asked the learned chief justice of the Superior Court, who presided at the trial, to instruct the jury as follows:

“If the parties entered into a contract by which the defendant agreed to advance money, by way of loan or otherwise, either to Professor Gray or to the Postal Telegraph Company, or for the construction of a telegraph line, or for the purchase of a factory at Ansonia, or for any other purpose, and the defendant did thereupon lend or advance any substantial part of the money he agreed to lend or advance, and said loans or advances have not, before the commencement of this suit, been repaid to the defendant, the contract is not rescinded, and this action for the bonds cannot be maintained.

“The plaintiff cannot maintain this action while any part of the contract, so far as the same has been performed in whole or in part by the defendant, has not been rescinded. He cannot avail himself, for his own use or that of the company in whose behalf he was contracting, of the defendant's advances, or of the benefit of the defendant's acts, and at the same time recover back the consideration for those advances or acts in this action.”

Without now considering whether the jury was justified in so finding, we assume, for the purposes of the present discussion solely, that the defendant did promise as the plaintiff alleged, and

that he fraudulently intended not to keep the promise so far as the loan of \$20,000 and the purchase of the thirty-two bonds are concerned. The learned judge declined to give the instructions above stated, which had been requested by the defendant. He stated the considerations upon which the evidence tended to show that the plaintiff was induced to part with his bonds, namely, "that the defendant was to furnish or procure money so as to cause the incorporation of the Harmonic Telegraph Company with the Postal Telegraph Company; that the defendant should furnish or procure money for the Ansonia factory, and that the defendant should build, or cause to be built, a line according to the Postal Telegraph system to Chicago." "Apparently," he adds, "there is no dispute that these three considerations enter into the arrangement by which these bonds passed from the plaintiff to the defendant." He then proceeds to the inquiry whether there was a fourth consideration, in the proposed loan and purchase of bonds, and after instructing the jury as to the rule which should govern in determining whether there was any such consideration, continues: "If the fourth consideration is proved, and you are satisfied that it had a material influence upon inducing this plaintiff to surrender his bonds, in other words, that unless the defendant had promised to buy thirty-two bonds at \$500 a bond, and lend \$20,000, he would not have given him the bonds, if you should be satisfied of that, and that there was fraud in the promise, then the plaintiff may recover notwithstanding those other considerations combined with this to induce him to give up the bonds."

It is conceded by the plaintiff, in his argument, that "it must also, under the ruling of the court, for the purposes of this inquiry, be assumed that the promises for the benefit of the Postal Telegraph Company had some influence in inducing the plaintiff to part with his bonds; that those promises were made in good faith, and have, to some extent at least been performed by the making of loans and advances, and that all of said loans and advances had not, before the commencement of this suit, been repaid to the defendant."

The right to rescind or avoid a contract proceeds upon the ground that a party has been fraudulently betrayed into making it, and having thus been induced to part with his own property, may resume possession of it on returning that which he has himself received, and thus placing the other party in the same position that

he was before the contract was made. If that which he returns is diminished in value by natural causes, or in the ordinary or proper use of it, he may still return it, as in such case, the contract being rescinded, such diminution is the loss of the original owner. *Res perit domino*. But if it be injured by his own negligence, he cannot return it, and his right to rescind the contract is gone. Where property is entirely worthless, it need not indeed be returned; but so strictly has the rule been held, that articles which are of the slightest value, or the loss of which may be a disadvantage in any way, must be returned, even if they have no intrinsic or no market value, as casks containing worthless lime, or sacks which have been on bales of wool. *Conner v. Henderson*, 15 Mass. 319. *Morse v. Brackett*, 98 Mass. 205; see also *Bassett v. Brown*, 105 Mass. 551; *Estabrook v. Swett*, 116 Mass. 303.

Where the promissory note of a party against whom a rescission of a contract is claimed has been given to the rescinding party, it is sufficient indeed for the latter to tender a return of it at the trial; for as between the parties to it, this is not property, but a promise only. *Thurston v. Blanchard*, 22 Pick. 18; s. c., 33 Am. Dec. 700; *Bridge v. Batchelder*, 9 Allen, 394.

Where property also has passed into the possession of a party cognizant of the fraud, it may be reclaimed, without proving that the defrauding party has been restored to his original position. In such case the party in possession of the property known by him to have been obtained by fraud is not in a position to raise the question whether restoration has been made or not. This is *res inter alios*, with which he has no concern, and is irrelevant to the issue at the trial. *Stevens v. Austin*, 1 Metc. 557; *Manning v. Albee*, 11 Allen, 520, and 14 Allen, 7.

If a wrong-doer who has obtained property by fraud has made expenditures upon it enhancing its value, he has no claim for these expenditures against one who by reason of the fraud practiced upon him, is entitled to demand its restitution, and who himself restores all which he has received, or tenders the restoration of it, when he rescinds the contract. In such case the wrong-doer is in a situation analogous to that of a trespasser who wrongfully converts a chattel and increases its value by labor bestowed upon it. *Guckenheimer v. Angevine*, 81 N. Y. 394.

In the case at bar, the parties to the original contract are before us. There was no attempt to place the defendant in the position

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in which he was before the contract, and the claim of the plaintiff is, that he may avail himself of all the advances made by the defendant in subscriptions and loans, of his efforts to interest others in the Postal Company, and of his services as its treasurer, the result of all which, as there was evidence tending to show, was largely to increase the value of the stock and bonds in which the plaintiff had an interest, so far as nominal values are concerned, of over \$3,000,000, and that he may recover from the defendant the full value of the one hundred and fifty bonds, which he gave him in consideration that the defendant would do these things, upon the ground that the defendant also promised to lend \$20,000, and purchase, for \$16,000, thirty-two bonds, and that he did not perform and fraudulently intended not to perform this latter promise, it being one of the inducements to the contract.

That if in any particular the defendant has failed to perform the contract which he made, intending not to perform it, the law will give the plaintiff a remedy by an action for deceit, in which the damages will be appropriate to the injury he has suffered, is readily conceded. It is quite a different proposition that the plaintiff may enjoy all the benefits he has received from the performance of a contract in its three most important particulars, and yet, retaining all these benefits, may abrogate it entirely on the failure of the other party to perform in a single particular, and may treat as his own and thus recover all the property which he has transferred in consideration of the contract.

While the loans and advances made by the defendant were not repaid him, which apparently might have been done, it is obvious also that there was an impossibility in restoring him to his original position in other respects, even if as to these it was possible. The risks he had run by the loans and advances made by him, the exertions he had made, and the success of those exertions in inducing others to make loans or subscriptions, and the results he had achieved, by which the immense block of Postal Telegraph Company stock and bonds belonging to the plaintiff had been largely increased in market value, could not have been adjusted and paid for by any satisfactory or practicable scheme of compensation.

It is not in our view important that the acts which the defendant was to do (with the exception of the alleged loan to the plaintiff and the purchase of his bonds) were all to be done, and were in fact all done, immediately for the benefit of the Postal Company,

and not for that of the plaintiff individually. The large interest which the plaintiff had in this company caused such acts, if successful in their results, to inure to the plaintiff's benefit, and this to the extent that he was interested therein. They were done also in carrying out the contract made with the plaintiff, as he had seen fit to make it. Even if the considerations which an alleged defrauding party performs go to the benefit of an independent third party, they would not be on that account the less good and sufficient considerations to support the contract made by the alleged defrauded party, if they thus went in pursuance of the agreement, and at his request. *Hubon v. Park*, 116 Mass. 541; *Turner v. Rogers*, 121 Mass. 12; *Cottage Street Church v. Kendall*, 121 Mass. 528.

The contention of the plaintiff is, that when the consideration of a contract is entire, but the promises by the defendant are several, and all of them except one have been honestly performed, which one he wrongfully intends not to perform, such contract may be repudiated and rescinded by the aggrieved party, and all that he conveyed in consideration thereof recovered back, without restitution on his own part of the benefits he, with other parties associated with him, has enjoyed, if such restitution, from the nature of the things done and contracted to be done by the defendant, is practically impossible. He urges, that it is only when the injured party by his own act has put it out of his power to restore what he has received, that he cannot rescind his contract.

The rule, as it has been repeatedly stated, is much narrower than this, nor have we found it anywhere judicially stated with the limitation which the plaintiff would place upon it. Indeed the careful research of counsel on either side has not brought before us any case where the precise question now raised has been distinctly adjudicated, unless it be the case of *Metropolitan Elevated Railway v. Manhattan Elevated Railway*, 11 Daly, 373, 453; s. c., 14 Abb. N. C. 103, 231. This is not a decision of the highest court of the State of New York, but it certainly does not favor the plaintiff's contention, as it is there held that where a party has, without any knowledge of any intention to rescind, and for no ulterior purpose, acted upon the faith of the agreement, and has lost rights thereby, and such rights cannot be restored, the injured party can obtain no relief, except through such reparation as an action at law to recover damages will afford.

There are a large number of cases in which it is not only said, but held, that where restitution cannot be made, the party injured must seek his remedy in some other way than by rescission of the contract, and that an action of damages for the deceit practiced upon him affords an ample remedy, to which he is unquestionably entitled. These cases do not, however, appear to have contained this element, that the benefit received by the party defrauded has been received in such form that from its nature it could not have been returned. *Bassett v. Brown* and *Estabrook v. Swett*, *ubi supra*; *Cook v. Gilman*, 34 N. H. 556; *Gould v. Cayuga County Bank*, 86 N. Y. 75; *Worley v. Moore*, 97 Ind. 15; *Smith v. Brittenham*, 109 Ill. 540; *Potter v. Taggart*, 54 Wis. 395; *Bisbee v. Ham*, 47 Me. 543.

The rule as given by most eminent judges certainly excludes the plaintiff in the case at bar from any right to rescind his contract, or to recover, in the form of action he has adopted, the value of the property he has parted with, and compels him to seek his remedy by an appropriate action for the injury he has sustained by the alleged failure of the defendant to make the loan and purchase contracted for. That in such action the rule of damages would be entirely different from that adopted in the case at bar is readily seen, as in such action he could recover damages only for the injury he had actually sustained, while he has been permitted to recover, as the case was submitted to the jury, for the full value of all the bonds he parted with, no regard being had to the benefits he had received from the performance of the contract, so far as the defendant had actually performed it, or to the burden which the defendant had necessarily sustained in such performance.

"Where a contract is to be rescinded at all, it must be rescinded *in toto*," says Lord ELLENBOROUGH, "and the parties put *in statu quo*." *Hunt v. Silk*, 5 East, 449. That this is a correct statement of the principles upon which the right to rescind a contract must rest has never been questioned, and it has often been adopted *in verbis*.

"When once it is settled that a contract induced by fraud," says Mr. Justice CROMPTON, in *Clarke v. Dickson*, 1 E., B. & E. 148, "is not void, but voidable at the option of the party defrauded, it seems to me to follow, that when a party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into

their original state before the contract." This expression is quoted, and its principle adopted in *Urquhart v. MacPherson*, 3 App. Cas. 831.

Western Bank v. Addie, L. R., 1 H. L. Sc. 145, was a cause where the shares which were the object of an alleged fraudulent sale had been changed into those of a differently constituted company. Originally they were shares in an unincorporated company, which had afterward become an incorporated one, with the usual statutory incidents. It was held, that there could be no rescission of the contract, on account of the impossibility of returning that which the injured party had received, and that he must seek his remedy by action against those who had deceived him. If the shares had simply depreciated in value, they would still have been the same, and might have been returned. The case also affirmed that of *Clarke v. Dickson*, *ubi supra*, and the language of Mr. Justice CROMPTON is again quoted.

In *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214, it is said by Mr. Justice LUSH: "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages."

Without quoting numerous other instances, both in England and in this country, in which the principle that contracts may be rescinded where fraud has been committed has been said by eminent judges to rest upon the fact that the parties can be restored to their original status, it is to be observed that the rule has always thus been stated in the decisions of this court.

It is said by Mr. Justice MORTON, in *Perley v. Balch*, 23 Pick. 283, 286; s. c., 34 Am. Dec. 56, where the controversy was as to certain goods alleged to have been sold under false and fraudulent representations: "The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified *in toto* or not at all. It cannot be enforced in part and rescinded in part. And if the property would be of any benefit to the seller, he is equally bound to return it. He who would rescind a contract must put the other party in as good a situation as he was before; otherwise he cannot do it." A similar statement is made by Chief Justice SHAW, in *Thayer v. Turner*, 8 Metc. 550.

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"A contract," says Mr. Justice WILDE, in *Coolidge v. Brigham*, 1 Meta. 647, "cannot be rescinded by one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It cannot be rescinded as to one party, and remain in force as to the other. It must be rescinded *in toto*."

In *Morse v. Brackett*, 98 Mass. 205, Chief Justice BIGELOW remarked: "This case comes within the familiar principle that no contract can be rescinded unless both parties are restored to the condition in which they were before the contract was made. One party cannot insist on the validity of a contract as to one portion of the subject matter, and claim to set it aside or avoid it as to the residue." See also remarks of Mr. Justice FOSTER, in the same case, and of Mr. Justice WELLS, in *Bassett v. Brown*, *ubi supra*.

The plaintiff relies much on the case of *Masson v. Bovet*, 1 Den. 69, 74, and especially upon the language there used, that "the law cares very little what his (the fraudulent party's) loss may be." In that case the rescinding party had restored to the defrauding party all that he had received; and the general rule that he who would rescind a contract must return, or offer to return, all that he has received, is distinctly recognized. All that the case decides is, that if the effect of such restoration is not to extricate the defrauding party from the condition in which he finds himself by reason of his fraud, he has no ground of complaint.

In *Hammond v. Pennock*, 61 N. Y. 145, where *Masson v. Bovet* is quoted with approbation, it was decided that the defrauding party could not prevent a rescission of the contract, because after making it he had himself done that which prevented his being restored to his original position. In that case he had sold and contracted to sell some of the land which was the subject of the contract, and it was held that in a suit in equity he might be compelled to transfer such of the land as had not been sold, the proceeds of such as had been sold, and to account for the proceeds so far as they could then be traced.

In neither case was the defrauded party released from his obligation to restore all that he had received. The other party was thus placed in the same condition that he was in before the transaction, so far as the two parties were concerned. Even if the effect of this restoration had not been, by reason of difficulties which the fraudulent party had himself created, and which were not things

done in pursuance of the contract, to extricate him from all the embarrassments in which he had involved himself, the other had still relinquished all the benefits which he or others acting with him had received by virtue of the contract, and the defrauding party had been restored to the position in which he stood before the contract was made, so far as any change had been caused by that which had been done pursuant to the contract.

We are of opinion that independently of authority upon the subject, the position that the avoidance of a contract becomes impossible only when the defrauded party has disabled himself from restoring what he has received, as by conveyance thereof, cannot be sustained upon grounds of reason and justice. We cannot hold that he may retain the benefits of such a contract, whether received by himself or by those in behalf of whom he acts, if it becomes practically impossible to reinstate the defrauding party in his original position by restoring what has been received, and that having annulled the contract without such restoration, he may recover back all that he parted with, if the other party to the contract has, in any particular, fraudulently failed in the performance of that which was an inducement to the contract. It is quite certain that the learned court which used the expression on which the plaintiff has much insisted, "the law cares very little what his (the fraudulent party's) loss may be," could not have intended thereby to say that a party, however fraudulent his conduct may have been, was not to be dealt with fairly. No man, however wrongly he may have conducted himself, is without the pale of the law, or beyond its protection; nor can fraud or wrong ever be righted by injustice. *Pearsoll v. Chapin*, 44 Penn. St. 9.

It is not through any action of the defendant that the plaintiff is unable to return the benefits he and the company in which he is so deeply interested have received from the moneys and the exertions of the defendant. The difficulty arises from the highly complicated series of transactions into which they mutually entered, and the magnitude of the enterprise in which they by mutual agreement embarked. The plaintiff was not brought into the Postal Telegraph Company and other collateral schemes by the defendant, or induced by him to receive the loans, advances, subscriptions, etc., which the defendant agreed to make, and has made, as the consideration (or part of the consideration) for which he was to receive the one hundred and fifty bonds. It was the plaintiff

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and his associates who induced the defendant to come in and interest himself in their enterprise. If in any particular the defendant has fraudulently failed to perform his contract, it is altogether just that he should pay to the plaintiff the damage he has occasioned by such failure, but there is no reason why he should be further liable than this. A civil proceeding is not intended to inflict punishment upon any one, still less a punishment which shall inure to the advantage of another who is sufficiently protected when he has received full indemnity for all the injury he has suffered. When such a one has been injured in but a single subordinate particular of his contract, he should not, for that reason, reap all the other benefits of it, without any compensation. Nor could any punishment be more capricious than that which would thus be inflicted upon the wrong-doer. It would be the same whether his wrongful conduct related to a great or small amount. Indeed the smaller his fault, proportionately, the larger would be his punishment, as he would thus lose the benefit of more that had been honestly and faithfully done by him. No matter how small the fraudulent promise made and not performed, if it were still appreciable as an inducement to the contract, it would cause him to forfeit the whole value he had expended, even if it amounted to many thousands of dollars. The case at bar itself affords a sufficient illustration of how harshly the rule would work which would permit an entire contract, involving many particulars, to be rescinded because in some detail it was fraudulently unperformed.

The defendant was to furnish or raise money to procure the incorporation of the Harmonic Telegraph system with the Postal Telegraph Company; he was to furnish or procure the money for the purchase of the Ansonia wire factory; and was to build, or cause to be built, a line, according to the Postal Telegraph system, to Chicago. All this involved large sums of money and great exertions, but he has failed to purchase the thirty-two bonds of the plaintiff at fifty per cent, and to lend the plaintiff \$20,000, according to the verdict of the jury, in fraudulent violation of his contract. For this failure, involving at its outside limit (if the loan was never repaid, and the bonds were utterly worthless) \$36,000, the rule for which the plaintiff contends requires that the defendant should forfeit for the benefit of the plaintiff the one hundred and fifty bonds given in consideration of all the defendant was to do; which bonds the jury have estimated in value at over \$100,000. According to this

rule, the result would also be the same, and the defendant would alike forfeit the whole, if he had agreed to purchase a single bond for \$500, or any other substantial sum, if such agreement had been an inducement to the contract. This is to allow a defrauded party to recover far more than the amount of any injury that can possibly have been inflicted upon him, and is not consistent with justice.

We are of opinion therefore that the learned judge erred in instructing the jury, that if they were satisfied that "unless the defendant had promised to buy the thirty-two bonds at \$500 a bond, and lend him \$20,000, he would not have given him the bonds, this promise being made fraudulently, the defendant intending not to keep it, the plaintiff would be entitled to recover, notwithstanding the other considerations which had been fully and honestly performed combined with this to induce him to give the bonds." The defendant was entitled to an instruction in substance, that if several distinct considerations entered into the contract to induce the plaintiff to part with the bonds, and three of these had been fully and honestly performed by the loans and advances made by the defendant, the plaintiff could not rescind the contract and maintain an action for the full value of the bonds, unless upon repayment of the sums which the defendant had lent or advanced; and further that if it was impossible from the nature of the transactions to restore the defendant to the condition in which he was before the contract, the plaintiff could not avail himself of the benefit of the loans, advances, services, and other acts, rendered either to himself or to the company for whom he acted, and at the same time rescind the contract and recover back the consideration for these loans, advances and services, but must seek his remedy in damages for the injury he had sustained by the wrongful and fraudulent failure of the defendant to perform the contract for the loan and purchase, which was the fourth consideration.

For the reasons already given, the exceptions to the ruling and refusals to rule in regard to this matter must be sustained.

The defendant has strongly urged that the finding of the jury, that he ever made any promise to make the alleged loan or purchase of bonds, was not justified by the evidence offered, which has been reported. As we have assumed that the jury might rightfully have found that he did make such promise, and have further held that even if this was the case, he was entitled substantially to the ruling

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requested by him, it is not necessary now to consider this inquiry. Whatever form the litigation on this subject may hereafter take, it is more than probable that the evidence at a subsequent trial will vary in a greater or less degree from that which is now before us. It would not be profitable therefore to discuss it in its present aspect, and might embarrass any subsequent examination of the facts.

The same remarks are applicable to the position taken by the defendant, that the plaintiff, with full knowledge that the defendant entirely repudiated any agreement for a loan or a purchase of bonds, still went on with the contract, and continued to receive benefit from subsequent services and advances of the defendant, and to the further position, that the plaintiff has, for a sufficient consideration, released any claim for damages by reason thereof to the defendant.

Other exceptions were taken to the rulings of the learned judge.

Some of them naturally grow out of the theory upon which the case was tried, which we have held to be erroneous. None of them require present discussion.

Exceptions sustained.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

DENVER FIRE INSURANCE COMPANY V. MCCLELLAN.

(9 Colo. 11.)

Corporation — ultra vires — estoppel.

A fire insurance company having insured against hail, which it was not authorized to do, the insured having performed his part of the contract and the company having accepted the benefit, the company is estopped to set up its want of power to issue such a policy.*

ACTION on a fire insurance policy. The head-note states the case. The plaintiff had judgment below.

Stallcup, Luths & Shaffroth and *Teller & Orahood*, for appellant.

Norville & Clark and *T. M. Robinson*, for appellee.

STONE, J. The sole question in this case is whether the appellant can avail itself of the *ultra vires* of the contract upon which its liability, if any, arises as a defense to the action.

[Omitting statement of pleadings.]

The authorities cited on both sides of the case are very numerous. Questions touching the *ultra vires* of corporations have been before the courts of probably every State in some shape, and various phases

* See *Cent. R. and B. Co. v. Smith* (76 Ala. 572), 52 Am. Rep. 353; *Day v. Spaul Springs Buggy Co* (57 Mich. 146), 58 Am. Rep. 352.

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of the question have been many times considered by the Federal courts, while standard text-books are full of research and discussion upon the entire subject. We have examined these authorities with care, but a review of them here would be unnecessary labor, since both the English and American authorities have been collated and discussed fully in many of the leading cases cited by counsel in their briefs filed in the case. In respect to the precise question before us, there is apparently much conflict of opinion in the decisions of the courts, such conflict being in many cases apparent only, but in others squarely antagonistic. It is quite well settled as a general rule that a corporation possesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects and purposes of its creation.

On the one hand, it is held by some authorities that acts of a corporation in excess of the powers limited by the foregoing rule are illegal, that any contract made in such excess of lawful authority is void and not enforceable, and that neither party to an action founded thereon is estopped to plead the *ultra vires* of the contract in bar of such action.

On the other hand, it has come to be the settled doctrine of several States that a corporation may be estopped to deny its authority to enter into a contract which has been executed, and from which it has derived the benefit which it thereby sought. There seems to be a growing tendency to this doctrine in modern decisions in this country and it is also supported by the authority of English cases.

As is said in *Parish v. Wheeler*, 22 N. Y. 494, a leading case upon this subject in the United States: "The executed dealings of corporations must be allowed to stand for and against both parties where the plainest rules of good faith require."

Mr. Waterman, in his late excellent treatise upon the Specific Performance of Contracts, says that it is now settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. § 226. So if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

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In the case before us, the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of the money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

It is not contended that the payment of the note was a condition precedent to his right of action against the company, since at the time of bringing the action, the note lacked two months of maturity, and there was nothing to be done or performed by him under the contract. The performance already made by the appellee had been accepted by the appellant company, and so far as it was concerned, the execution of the note was the same as a cash payment in full of the amount; the company had the benefit thereof. It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defense of *ultra vires*, here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defense of *ultra vires*.

That the public has such an interest is quite true, but whether to afford such protection the defense of *ultra vires* is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrongdoing. Such policy would rather seem to offer a premium for dishonest dealing.

Besides, both the State which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have

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their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. If the other party proceeds to the performance of the contract, expending his money and labor in the production of values, which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers. *Bradley v. Ballard*, 55 Ill. 413; s. c., 8 Am. Rep. 656.

Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void. *Bissell v. Mich., etc., R. Co.*, 22 N. Y. 258.

The plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons. *Bissell v. Mich., etc., R. Co.*, 22 N. Y. 258. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us.

The answer of the insurance company does not deny the averment in the complaint that the company "was doing business in Larimer county, in the State of Colorado, as a general fire and hail insurance company." It does not deny that it entered into the contract of insurance with the appellee in manner and form as alleged in said complaint, nor that the contract was executed as

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averred. The sole defense upon which the appellant company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having nothing at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts could avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the States affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent

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which can only be denominated preposterous. It was in answer to the same point that Chief Justice COMSTOCK observed, in his opinion in a leading case upon this question, that "a traveller from New York to Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." *Bissell v. M. S. & N. J. R. Co.*, 22 N. Y. 258. It was urged in argument on behalf of appellant that the State, which created these corporations for public good, has such an interest in their existence and perpetuity that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent and the State may interpose to revoke their charters for an abuse thereof; but we take it that it is no more the public policy of the State to protect the business of private corporations than that of its individual citizens; and to invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretenses by holding that the party defrauded should be punished by the loss of his money or goods.

While such wrong may be prevented by interference on the part of the State, or stockholders of the company, it cannot well be said that to cure the evil it is necessary in every case to exempt the company from the liability of its unauthorized engagements.

The principle of estoppel by conduct is the same principle which is applied by courts in holding that the statute of frauds, by which under the general rule a contract would be void, is never to be used for the protection of a fraud.

The essential elements of an estoppel by conduct are laid down by this court in *Griffith v. Wright*, 6 Colo. 248, to be that: 1. There must have been a representation or concealment of material facts. 2. The representations must have been made with knowledge of the facts, unless the party representing was bound to know them, or that ignorance thereof was the result of gross negligence. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party should act upon it; but gross and culpable negligence on the part of the party sought to be estopped, the effect of which is to make a fraud on the party setting up the estoppel, supplies the place of intent. 5. The other party must have

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been induced to act upon it. The case before us seems to be fairly brought within the foregoing rules and definitions. The insurance company, through its agent, not only concealed the want of authority to insure against hail, which it now sets up, but its open notorious acts in soliciting policies of this character throughout the country impliedly held out and represented its authority for such business.

Such agent was certainly bound to know the extent of the authority of the company he represented, and if his acts in the premises were not done with full knowledge of the facts, his ignorance in this respect was gross and culpable negligence.

That the appellee was ignorant of the truth of the matter of want of authority in the company is not denied by the appellant company, except by an inference which it is argued, is to be drawn that the articles of incorporation and the record thereof furnished constructive notice of the extent of authority of said company. But it seems to us that such an inference is rebutted by the presumption fairly arising from the nature of the transaction, that the appellee would not have paid his money for the performance of a promise which he knew was void; that its performance could not be enforced, and that his money would be utterly thrown away.

That the offer of the appellant to insure, and the representations made to induce the appellee to enter into the contract of insurance, were made with the intent that the appellee should act thereon, is self-evident from the nature of the transaction, and the acceptance by the appellee of the offer so made by the appellant; and that the appellee was induced to act upon the offer and representations so made is equally apparent, for the act was an obvious sequence of the inducement.

It was strenuously contended by counsel for appellant in the oral argument of this case that whether the contract in a case of this kind is executed or not is immaterial; that the true grounds of liability depend upon, and should be placed upon the fact of whether the elements of estoppel exist; whether the conduct of one party has been such as that the other party would be defrauded or injured thereby unless the contract should be enforced.

However this may be in respect to the other cases, or as a general rule, we are quite willing to assent to this view in the particular case before us, and to rest our decision upon the ground of estoppel by the conduct of the appellant company.

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We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company, but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee *in statu quo*. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company as expressed and conferred by their articles of incorporation, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defense of the appellant company interposed against its liability on the contract is inequitable, unconscionable and should not be allowed.

It is admitted that a contract is not enforceable when prohibited by statute; when not so prohibited however, and when not illegal or immoral in its nature, nor contrary to sound public policy, a contract even *ultra vires* may be enforced, when under the circumstances of its execution, every consideration of justice requires it. This is the ground of decision in most of the cases relied upon by the appellee in the case.

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As is said by the Supreme Court of the United States in the case of *Zabriskie v. Cl., Col. & Cin. R. Co.*, 23 How. 400: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claim their own conduct has superinduced."

Among the many authorities examined in support of our views in this case, we cite the following: *Parish v. Wheeler*, 22 N. Y. 503; *Bissell v. M. S., etc., R. Co.*, 22 N. Y. 258; *Bradley v. Ballard*, 55 Ill. 413; s. c., 8 Am. Rep. 656; *Whitney Arms Co. v. Barlow*, 63 N. Y. 69; s. c., 20 Am. Rep. 504; *Darst v. Gale*, 83 Ill. 141; *State B'd of Agr. v. Citizens' Street R. Co.*, 47 Ind. 407; *Oil Cr., etc., R. Co. v. Penn. Trans. Co.*, 83 Penn. St. 166; *Argenti v. City of San Francisco*, 16 Cal. 255; *State v. Woram*, 6 Hill, 37; s. c., 40 Am. Dec. 378; *Converse v. Norwich & N. Y. Trans. Co.*, 33 Conn. 180, modifying the doctrine in the case of *Hood v. N. Y. & N. H. R. Co.*, 22 Conn. 502; *Chicago Build. Soc. v. Crowell*, 65 Ill. 453; *Ward v. Johnson*, 95 Ill. 215-240; *Zabriskie v. Cl., Col. & Cinn. R. Co.*, 23 How. 398-401; *Hitchcock v. Galveston*, 96 U. S. 341-351; *Nat. Bank v. Matthews*, 98 U. S. 621; Green's Brice's *Ultra Vires*, 371, and cases cited; Sedgw. Stat. and Const. Law, 90; Waterman Spec. Perf., cited *supra*.

The judgment of the court below is affirmed.

Judgment affirmed.

BROOK, C. J., and HELM, J. (concurring). Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

But for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This

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exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto ; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This however does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it ; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice STONE, who writes the principal opinion.

Judgment affirmed.

Pomeroy v. Rocky Mountain Insurance and Savings Institution.

POMEROY V. ROCKY MOUNTAIN INSURANCE AND SAVINGS INSTITUTION.

(9 Colo. 206.)

Insurance — condition — waiver — knowledge of president.

A policy of life insurance was conditioned to be void if the insured should become so far intemperate as to impair his health, or induce delirium tremens. The insured allowed the policy to become forfeited, transferred it to the plaintiff for a debt, and the latter arranged with the president of the company for its revival, and paid the sums required to keep its policy in force until the insured's death, which happened shortly after the revival. The president knew that the insured had become so intemperate as to injure his health. *Held*, that the company was liable.

ACTION on a life insurance policy. The head-note states the facts. The defendant had judgment below.

Stuart Bros., for plaintiff in error.

B. F. Harrington and *W. W. Cover*, for defendant in error.

ELBERT, J. Johnson was the president and general manager of the defendant company, and had charge of its home office, at Denver, with full power to write insurance and to represent the company. The company is bound by his acts in issuing the policy of insurance, in permitting its renewal and assignment, and in receiving the back dues necessary to its renewal, and the premiums thereafter becoming due. *Bliss Life Ins.*, § 278; *Whart. Agency*, § 202; *Wood Fire Ins.*, §§ 383, 391. His knowledge touching the condition of health of the insured must be regarded as the knowledge of the company. *Story Agency*, § 140; *Bliss Life Ins.*, §§ 76 *et seq.*; *Ang. & Ames Corp.*, § 305; *Whart. Agency*, § 184.

Johnson having permitted the renewal of the policy and its assignment, with full knowledge of Barton's impaired health by reason of his intemperate habits, and with full knowledge that the plaintiff renewed and took an assignment of the policy as a security for advances already made, and thereafter to be made, having at the time received from the plaintiff payment of all back dues necessary to its renewal, and thereafter payment of the premiums on the policy as they became due, is to be regarded as having waived the condition respecting the impairment of health of the insured by

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intemperate habits. The company cannot be allowed to treat the contract as valid for the purpose of collecting dues, and as void when it comes to paying the insurance; or as otherwise stated, "the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died." *Insurance Co. v. McCain*, 96 U. S. 84; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154; *American Cent. Ins. Co. v. McLanathan*, 11 Kans. 533; *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124; s. c., 14 Am. Rep. 27; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Short v. Home Ins. Co.*, 90 N. Y. 16; s. c., 43 Am. Rep. 138; *Bennett v. North B. Ins. Co.*, 81 N. Y. 273; s. c., 37 Am. Rep. 501; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; s. c., 32 Am. Rep. 330; *Buckbee v. United States Ins. Co.*, 18 Barb. 541; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368; *Bliss Life Ins.*, §§ 278 *et seq.*, and cases there cited; *Wood Fire Ins.*, "Waiver," chap. 20; "Estoppel," chap. 21, and cases there cited.

If there was collusion between the plaintiff and Johnson, the president, to defraud the defendant company, it is matter of defense, to be pleaded.

While it appears from the complaint, generally, that the defendant company is a mutual company, we are not prepared to admit the proposition that that fact necessarily takes the case without the operation of any of the rules which we have stated. Theoretically, the insured in mutual companies are members of the company, but immunity from the above rules would not follow from that relation alone. The charter and by-laws of the company are not before us, nor are we advised that they prescribe any form of policy or limitation upon the powers and duties of the general officers and agents of the company that would exempt the company from liability in this case. As the record stands, the question made by counsel in this behalf is not fairly presented, and we intimate no opinion respecting it.

The court erred in sustaining the demurrer to the complaint. The judgment must be reversed, and the case remanded.

Judgment reversed and case remanded.

HELM, J., dissenting.

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ROGERS v. PEOPLE.

(9 Colo. 450.)

Criminal law — general law and city ordinance — constitutional law.

Where the charter of a city gives it exclusive power to prohibit and suppress disorderly houses, and the city has enacted an ordinance to that end, one cannot be convicted under the previously-enacted general law, of the offense of keeping a disorderly house.

THE opinion states the case.

Rogers and McCord, for plaintiff in error.

Theo. H. Thomas, attorney-general, for people.

HELM, J. The principal question presented in this case may be briefly stated as follows: Does the statute of 1885, which confers upon the city council of Denver power, by ordinance, "exclusively to prohibit and suppress * * * dance-houses, bawdy-houses, disorderly houses, houses of ill fame or assignation, or any place for the practice of lewdness or fornication within said city," have the effect of suspending, within the corporate limits of the city, the operation, *pro tanto*, of section 839 of the general statutes, which reads: "If any person shall be guilty of open lewdness, or other notorious acts of public indecency, tending to debauch the public morals, or shall keep open any tippling or gaming house on the Sabbath day or night, or shall maintain or keep a lewd house or place for the practice of fornication, or shall keep a common, ill-governed, and disorderly house, to the encouragement of idleness, gaming, drinking, fornication, or other misbehavior, every such person shall, on conviction, be fined not exceeding \$100, or imprisonment in the county jail not exceeding six months?"

This general provision was adopted upward of twenty years ago, and has never been repealed. The special act above mentioned is the later of the two. Therefore if both are valid, and if both cannot be given full force and effect, the former must give way to the extent of the conflict existing between them.

The original charter and various amended charters enacted for the government of the city of Denver, in so far as they do not refer to matters within the expressly enumerated constitutional inhibi-

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tions, are not obnoxious to objection under section 25, article 5, of the Constitution, which treats of local or special legislation. And in general, a legislative amendment of the charter will not be reviewed by this court for the purpose of determining whether under the concluding sentence of this constitutional provision the changes incorporated could be made by general law. *Brown v. City of Denver*, 7 Colo. 305; *Carpenter v. People*, 8 Colo. 116; *Darrow v. People*, 8 Colo. 426.

The use by the general assembly of the word "exclusively," in conferring power to prohibit and suppress bawdy-houses, indicates a design to place that matter entirely under the control of the city council. A provision relating to the prohibition and suppression of bawdy-houses has existed in the charter since 1874, but until the last session of the legislature the authority thus vested in the council was not exclusive. This fact demonstrates that the word "exclusively" could hardly have found its way into the enactment through inadvertence or mistake. The intention of the legislature in the premises is too plain to admit of serious doubt.

The pleadings show that the city council accepted and duly exercised the authority conferred; that an ordinance was passed in strict conformity with the statute in question, and fully covering the subject. Under the circumstances, unless the general assembly was powerless to delegate such exclusive control, or unless the legislative action be in conflict with some constitutional provision other than the one above mentioned, it follows that all prosecutions for committing the forbidden act within the limits of Denver must take place under the city ordinance.

Can the general assembly confer upon the council exclusive legislative control over this subject? A house of prostitution is a constant menace to the public peace and good order of the community in which it exists. It is a nuisance, and its keeping a misdemeanor, at common law. Its suppression and punishment are proper subjects of police regulation. In one form or another the authority to prohibit and suppress is very generally given to cities and towns and quite as generally exercised by them. It is true, the general policy of our statutes and of the common law is to wholly inhibit these places, and it is also true that the people of the entire State are, to some extent, interested in the suppression thereof. But in the first place, the statute gives the council no authority to license or regulate, they can only prohibit and sup-

press, the evil; and secondly, the existence of such houses within the incorporated limits is a matter that peculiarly concerns the citizens of Denver. They, more than the people elsewhere, are brought into contact therewith, and suffer through the vicious influences emanating therefrom. Moreover the subject is one with which, from its very nature, the local authorities can more intelligently and effectively deal than can the general assembly. It is a matter fairly pertaining to the province of "local self-government." It was competent for the legislature to give the city council legislative control. Cooley Const. Lim. 228, and note; also, page 261. And we discover no sufficient reason for holding that this authority shall not be made exclusive and plenary, controlled only by such express constitutional inhibitions or mandates as may be found applicable. *State v. Clarke*, 54 Mo. 17; s. c., 14 Am. Rep. 471; *State v. De Bar*, 58 Mo. 395; *Davis v. State*, 2 Tex. App. 425; *Berry v. People*, 36 Ill. 425; *State v. Gordon*, 60 Mo. 383; *Hetzer v. People*, 4 Colo. 45; *Huffsmith v. People*, 8 Colo. 175; *Seibold v. People*, 86 Ill. 33, and cases.

In *Berry v. People* and *State v. Gordon*, above cited, the offenses charged were gambling and disturbance of the peace, respectively. In the cases of *Hetzer*, *Huffsmith*, and *Seibold v. People*, the prosecutions related to tippling-houses or the vending of intoxicating liquors. But so far as the delegation of exclusive legislative control is concerned, we think these decisions may fairly be cited in support of our conclusion in the case at bar.

It is insisted that the power "to prohibit and suppress" does not include the power to provide for punishment. This proposition is not tenable. The right to pass ordinances usually carries with it "the incidental right to enforce them by reasonable pecuniary penalties." 1 Dill. Mun. Corp., §§ 338, 376, and note 1; Bish. Stat. Crimes, § 1. Besides section 18 of the act in question reads as follows: "The city council is hereby authorized to provide for the punishment of all offenses against the ordinances of the city by imprisonment," etc. Having the authority to pass an ordinance to prohibit and suppress bawdy-houses, and having power "to provide for the punishment of all offenses against the ordinances," it follows that the council is authorized to provide for the punishment of those who violate the ordinance imposing this particular inhibition. The phrase "to provide for the punishment," as used, confers at least concurrent power over the subject of

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punishment. Such power must, of course, be exercised subject to constitutional requirements in relation to courts, their procedure and practice.

But a further and more embarrassing question is presented. Section 28, article 6 of the Constitution, provides as follows: "All laws relating to courts shall be general, and of uniform operation throughout the State; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform."

Since the effect of the act now under consideration is to repeal, within the corporate limits of Denver, a part of section 839 of the General Statutes, and since no prosecutions for offenses committed within the city can be maintained under the provision thus repealed, the indirect result is that the territorial jurisdiction of the criminal court of Arapahoe county over certain misdemeanors is correspondingly curtailed; while the power of the criminal courts in Lake and Pueblo counties to entertain prosecutions throughout those counties for such offenses, under the general statute referred to, remains the same as before. Therefore counsel contend that the uniformity of jurisdiction required by the Constitution among the criminal courts, which are unquestionably courts of the same class or grade, is by virtue of the Denver statute destroyed.

Section 13, article 14 of the Constitution, commands the legislature to provide, by general law, for the organization and classification of cities and towns. It limits the number of such classes to four, and requires that the powers and restrictions of all cities or towns belonging to the same class shall be similar. This provision clearly authorizes the granting of different powers and different restrictions to the different classes of municipal corporations mentioned. And there is clear constitutional authority for bestowing upon one class, within certain limits, exclusive legislative control over a given subject pertaining to local self-government, while another class is allowed only concurrent power in connection therewith.

If the existing general act relating to cities and towns placed in the first class all cities having a population of thirty thousand or upward, and conferred upon them the identical powers specified in the special charter before us, Denver could, at present, be the only city of this class. But if Denver were reincorporated under

such general law, there would be produced the exact result we are now discussing, that is to say, the exclusive power to prohibit and suppress bawdy-houses would be exercised by Denver alone, a part of section 839 of the General Statutes would be suspended within its corporate limits, and the territorial uniformity of jurisdiction of the criminal courts would thus suffer the self-same disturbance of which counsel complain. But if the legislature, in its wisdom, should see fit to repeal section 839, aforesaid, the disturbance would at once cease, and entire territorial uniformity would be restored. A like result would also follow such repeal where, as in the case at bar, the supposed want of uniformity is produced by a special act which is otherwise constitutional.

Thus it appears that the view urged upon us in this connection leads inevitably to the following, among other curious conclusions, viz.: That the constitutionality of a statute may, in a given instance, be made to depend, not upon its character or its status with reference to the Constitution, but upon its relation to some other legislative enactment; and that in such case while each act, standing alone, would be perfectly valid, the co-existence of both renders one of them unconstitutional and void.

In construing constitutional as well as statutory provisions, the cardinal rule is to discover and enforce the intention of those who made them. Hence we are led to inquire, what was the purpose of the framers of the Constitution when they inserted section 28 of article 6, and what was the purpose of the people when in their sovereign capacity they adopted it? It is a well known-fact that under our territorial government, laws providing for the organization, jurisdiction and procedure of courts of the same grade were often widely different. This diversity was sometimes as great "as if (to use the language of Mr. Justice BECK in *Ex parte Stout*, 5 Colo. 509) such courts were located in different States or Territories." It is unnecessary to dwell upon the inconveniences and evils resulting from such a condition of affairs, or to detail the advantages arising from uniformity in these respects throughout the State. The importance and value of such uniformity are obvious to all interested persons, particularly to all members of the bench and bar.

It was doubtless with a view to preventing, under the new government, the existence of such mischievous confusion in this regard that said section 28 was adopted. The attention of the constitutional convention was directed to those laws which had been or would

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be passed by the legislature on the subject of courts, their jurisdiction and procedure. The members of that body did not contemplate, and were not considering, general legislation with reference wholly to other matters. Their leading design in framing the provision before us evidently was to compel such legislation as would remedy the existing evils in this respect, and to have all laws thereafter adopted in relation to courts general and of uniform operation throughout the State; also to require that statutes providing for the organization and defining the jurisdiction, practice or procedure of courts of the same class or grades, be so drawn as to secure to such courts an organization, jurisdiction, practice and procedure in all respects similar. This section was not intended to inhibit the passage of statutes entirely upon other subjects, and sanctioned by other constitutional provisions, which however might incidentally and remotely operate to disturb, for the time being, the territorial uniformity of jurisdiction possessed by courts of the same class or grade.

We feel compelled to overrule the objection in this behalf urged. In the first place, the statute conferring upon the city council of Denver exclusive authority to prohibit and suppress the evil mentioned, is sanctioned by the Constitution itself. Second. It does not deal, nor was it intended to deal, in any manner with courts or their jurisdiction. It was simply designed to place in the hands of the city council legislative authority to pass an ordinance prohibiting and suppressing the evil, together with the incidental authority to prescribe a penalty for the violation thereof. The power of designating a court in which prosecutions for the offense should take place, or of prescribing the jurisdiction and procedure of such court is not sought to be given, nor is there any attempt to exercise it. Third. As we have already seen, the effect of this statute is simply to suspend, within the corporate limits of Denver, the operation of a part of said section 839, which general law does not refer to courts, or purport to prescribe the jurisdiction or procedure of any class of courts. On the contrary, it was passed solely for the purpose of recognizing as misdemeanors certain acts therein enumerated, and designating the punishment that should be inflicted upon persons found guilty thereof.

To say, under all the circumstances, that there is such a conflict between the statutory provision assailed and section 28, article 6 of the Constitution, as invalidates the former, would be to adopt a rule of constitutional interpretation of which we find in the books

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no sufficient recognition. Besides it would, in our judgment, lead to a vast amount of uncertainty and litigation; for by thus giving an effect to constitutional provisions not intended by the convention or the people, necessary legislation would be rendered more difficult than it is, and many beneficent statutes would fall. Upon this view we rely with confidence; but were we to admit that the question is a doubtful one, there would still, under the authorities, be no ground for judicial interference.

We are aware of the principle that in law, as a general thing, that which cannot be done directly cannot be done indirectly. But as we have tried to show, this principle has no real application to the case at bar. Any clear legislative attempt to evade indirectly a constitutional provision would be as promptly held void as a direct assault thereon couched in the most unambiguous terms.

The branch of the discussion relating to the constitutional provision which clothes District Courts with "original jurisdiction of all causes, both at law and in equity," will not be considered. The subject is not fairly involved in the case, and our views thereon would be *obiter dicta*.

From the foregoing conclusions it appears that the plea to the indictment was good and that the demurrer thereto should have been overruled. The judgment is accordingly reversed.

Judgment reversed.

MURRAY V. MARSHALL.

(9 Colo. 422.)

Innkeeper — liability for baggage of guest after departure.

Where a guest, on leaving a hotel, without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the clerk, and returns within forty-eight hours, the innkeeper is liable as a bailee for want of ordinary care, and the loss of the valise raises a presumption of negligence against him.

ACTION for value of a valise and contents. The head-note shows the facts. The plaintiff had judgment below.

George C. Norris, for appellant.

Augustus Macon, for appellee.

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ELBERT, J. An innkeeper is bound to take extraordinary care. His responsibility approximates to insurance whenever the thing brought to the inn has been confided expressly or by implication to his keeping. Schouler Bailm. 262. No question is made respecting the liability of the innkeeper as stated, but counsel insist that the liability of Murray, the plaintiff in error, ceased when Marshall, the defendant in error, left his hotel, leaving his valise in his care, that thereafter he was a bailee without compensation, and liable only for gross negligence.

It is said generally that after the relation of guest ceases, the innkeeper appears liable only as an ordinary bailee, gratuitous or otherwise, for the inanimate goods his departing guest may have left in his care, unless strict proof be furnished of a different understanding. Schouler Bailm. 270, and cases cited. Mr. Wharton, in his work on the Law of Negligence (§ 687), says: "It is an interesting question how long, when a guest leaves his baggage with an innkeeper, the innkeeper is liable as innkeeper for such. Judging from the analogy obtaining as to common carriers, we would conclude that the exceptional and onerous insurance liability of the innkeeper would not continue after the guest had permanently left the inn, allowing of course for a few hours which may be necessary for porters to effect a removal." At the same time he cites "as not without weight," the case of *Adams v. Clem*, 41 Ga. 67. In the case cited the guest departed from the inn, leaving her trunk in the possession of the innkeeper, with his consent, to be called for. Upon the following Friday the trunk was called for, but the plaintiff in error had lost it in the meantime, and could not deliver it, nor could he show any diligence in taking care of it. **BROWN, C. J.**, says: "We think in such case that an innkeeper, with whom the baggage of his guest is left, with his consent, though he gets no additional compensation for taking care of it, is still liable for it as innkeeper, for a reasonable time, to be estimated according to the circumstances of the case, after which he would be only a bailee without hire, and liable as such. We are not prepared to say that the time was unreasonable which intervened in this case before the guest sent for her baggage." The doctrine of this case seems to rest largely upon the fact that the baggage of the guest was left "with the consent" of the innkeeper; that from his acts under the circumstances of the case, a contract is to be implied by which the innkeeper consents to continue his liability as innkeeper

for a reasonable time. The case of *Giles v. Fountleroy*, 13 Md. 138, is an authority for saying that the profit which the innkeeper derives from the entertainment of the guests affords a consideration for an undertaking in some respects similar. The court say: "The baggage was that of a guest, who after paying his bill was entitled to the use of his room for the whole day. The agent of the landlord undertook to keep the trunk until four o'clock, and then send it to a particular steamer. And such an undertaking, it seems, was consistent with what a travelling guest had a right to expect, in accordance with the rules and usage of the house. Conveniences and facilities held out to travellers are matters which influence them in selecting hotels for their accommodation, and the profits which innkeepers derive from the entertainment of their guests afford considerations for such undertakings as the one here alleged."

Departing guests not infrequently leave baggage in care of the innkeeper for a few hours or a few days, to be called for or to be forwarded to some designated destination. The great increase of modern travel creates an increased demand for more extensive accommodations in this respect. With a view of influencing travellers in selecting their hotels, innkeepers more or less generally respond to this demand, and provide increased accommodations, and assume voluntary duties respecting the baggage of guests thus left in their charge. In such case if the liability of the inn-keeper is that of bailee without compensation, guests are left with little or no protection. The cases cited show a tendency to enlarge it.

In the case at bar, the defendant in error left on the morning of the 26th, and returned on the morning of the 28th, an absence of about forty-eight hours. While it appears from his testimony that he did not at the time expect to return to the hotel as a guest, it also appears that he did not pay his bill upon departing from the hotel, but left it unpaid until the morning of the 28th, when he returned to get his valise. He paid his bill, but the plaintiff in error was unable to deliver or account for his valise. Under the facts we think he should be held liable. The baggage was left with his consent, and the time was not unreasonable. In addition to this, for the unsettled bill of the defendant in error the law gave the plaintiff in error a lien upon the baggage left in his care. Whether the baggage was left and retained with such a view does not affirmatively appear, nor is it necessary to the lien that it should. We must treat the baggage as having that *status* which the law

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assigns it in the absence of any thing showing that the plaintiff in error waived his right to the lien. His lien as an innkeeper would seem to involve a concession of his liability as an innkeeper, since the law gives the lien on account of his extraordinary liability. *Grinnell v. Cook*, 3 Hill, 485; s. c., 38 Am. Dec. 663. If the fact that the defendant in error had departed without any intention of returning in the character of guest can be said to affect this proposition, then the *status* of the plaintiff in error was that of bailee holding property upon which he had a lien as security for a sum due. In this character he was bound to ordinary diligence and ordinary care, and upon the demand of the baggage by the defendant in error it was not sufficient to say that it had been lost, or that he supposed it had been carried off by some drummer. The loss under such circumstances is *prima facie* evidence of negligence, and it lies with the bailee to destroy the presumption. 2 Kent Com. 581; Schouler Bailm. 192; *Murray v. Clarke*, 2 Daly, 102.

The judgment of the court below is affirmed.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

PRESIDENT, ETC., V. LEONHARDT.

(86 Md. 70.)

Carrier — contributory negligence of passenger on street car — walking before car stops.

SUFFICIENTLY reported, 58 Am. Rep. 111.

NATIONAL BANK OF CHESTER COUNTY V. ARMSTRONG.

(86 Md. 112.)

Evidence — handwriting — comparison.

A witness, who had sworn that a signature in question was not in the defendant's handwriting, was shown, on cross-examination, a letter admitted to be in the defendant's writing, and on a subject foreign to the case, for the sole purpose of refreshing his memory. *Held*, that the plaintiff's counsel was entitled to ask him if he was still of the same opinion.

ACTION against an indorser on a note. The opinion states the facts. The defendant had judgment below.

Albert Constable, for appellant.

Henry W. Archer, for appellee.

National Bank of Chester County v. Armstrong.

MILLER, J. This action was brought by the bank, as payee, against Armstrong as indorser of a promissory note for \$1,400, and the defense was forgery. The case was tried upon issue joined on the plea of *non assumpsit*, and at the trial two exceptions were taken by the plaintiff to the rulings of the court. As these rulings were the same in each exception, only one of them need be stated, and it is substantially as follows:

After the plaintiff had proved by several witnesses acquainted with defendant's handwriting, that in their opinion the disputed signature was genuine, the defendant himself testified that it was a forgery, and that he had never indorsed such a note. He then proved by a witness who had frequently seen the defendant write, and was familiar with his signature, that in his opinion this indorsement was not in defendant's genuine handwriting. On cross-examination the witness said that this opinion was based upon the fact that the defendant's handwriting was heavier and larger than the indorsement of his name on the note sued on. The plaintiff's counsel then, for the purpose of refreshing the witness' memory, and for no other purpose as they announced to the court, exhibited to the witness a letter which had previously, during his examination, been shown to the defendant, and which he admitted to be in his genuine handwriting both in the body and signature (but which had been written upon a subject foreign to this case, and the contents of which would not have been admissible, and were not admitted upon any issue joined in this action), and proposed to ask the witness to examine this letter, and then say whether he still retained the opinion expressed in his examination-in-chief, viz., that the defendant's name indorsed on the note in suit was not in his genuine handwriting. But the defendant objected and the court sustained the objection, and refused to allow the witness to examine the letter or the proposed question to be put to him, and to this ruling and action of the court the plaintiffs excepted. In the other exception the same question was asked of another witness and the same ruling made.

To have allowed these witnesses to examine this letter for the purpose of refreshing their memories as to the defendant's handwriting, and then say whether they were still of opinion the disputed signature was not genuine, would in no wise have infringed the rule which is well settled in this State against proof of handwriting by comparison of hands. It is not the case of placing the disputed signature and a genuine writing before a witness who had

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no antecedent knowledge on the subject, and allowing him from the mere inspection of the two to say whether in his opinion they were both written by the same person. These witnesses both testified that they had frequently seen the defendant write and were familiar with his signature, and by reason of their knowledge of his handwriting thus acquired were competent and qualified to testify as to the genuineness *vel non* of this indorsement. Speaking from that knowledge they said in their examination-in-chief that in their opinion it was not genuine. Then on cross-examination, after having given as a reason for their opinion that the defendant wrote a heavier and larger hand, the cross-examining counsel for the purpose of refreshing their memories as to the character of his handwriting, exhibited to the witnesses a letter and signature which the defendant himself admitted he had written, asked them to examine it and then to say whether they were still of the same opinion. We see no objection whatever to this course of cross-examination, and are clearly of opinion it should have been allowed.

In *Smith v. Walton*, 8 Gill, 77, where *non est factum* was pleaded to a single bill, one of the witnesses, called by the plaintiff to prove the defendant's signature, testified that although from his knowledge of the general character of the defendant's handwriting, he believed the signature of the surname to be genuine, he could not say so as to the Christian name, and could not therefore prove the whole signature. The plaintiff's counsel then for the purpose of refreshing his memory exhibited to the witness a draft purporting to be drawn by the defendant in favor of the witness, and which the witness proved was signed by the defendant in his presence, and the court said: "This course of examination was perfectly legitimate, and if the witness, after having thus retouched and strengthened his recollection of the defendant's handwriting by inspecting the draft, had stated that he believed the disputed signature to be genuine, as the result of a comparison between that signature and the impression he had formed in his mind, as to the general character of the defendant's writing derived from antecedent knowledge, no legal exception could have been taken to the testimony." We are unable to perceive any substantial difference between what was held a legitimate course of examination in that case, and what the court below by the rulings complained of refused to allow in this. [Omitting other points.]

Judgment reversed and new trial awarded.

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PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY V. HOGELAND.

(66 Md. 149.)

Negligence — concurrent — imputability.

SUFFICIENTLY reported, 57 Am. Rep. 492.

 ALBERT V. STATE.

(66 Md. 385.)

Negligence — landlord and tenant — defective premises — injury to third person.

Where the owner of a wharf leases it, and knows, or by the exercise of reasonable diligence might have learned, that it is in an unsafe condition, he is liable to a third person injured by reason of its condition while lawfully on it.*

ACTION by a child for death of his father by negligence. The head-note states the point. The defendant had judgment below.

Talbot J. Albert and *Wm. Pinkney White*, for appellant.

Jno. J. Donaldson and *D. G. McIntosh*, for appellee.

STONE, J. [Omitting other questions.] In deciding the law of this case it will not be necessary to refer to the prayers either of the plaintiff or defendant further than we have done, as they were all rejected and the court's own instruction was given, if that instruction covered the whole law of the case. When we say that all the prayers were rejected, we should except the fifth prayer of plaintiff, and sixth of defendant. The defendant does not of course appeal from the granting of his own prayer, and we do not understand the defendant as making any serious contention against the plaintiff's fifth prayer, and we may therefore confine ourselves to the court's instruction.

That instruction substantially laid down the law to be, and so instructed the jury, that if they found that the defendant was the

* See *Culder v. Smalley* (66 Iowa, 219), 55 Am. Rep. 270.

owner of the wharf, and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and that the accident happened in consequence of such condition, the plaintiff was entitled to recover.

Of the correctness of the rule so laid down, provided the jury found the facts, we think there can be no reasonable doubt. The law is very tersely laid down as far back as the case of *Roswell v. Prior*, 12 Mod. 639, where the court say: "This action is well brought against the erector, for before his assignment over he was liable for all consequential damages; and it shall not be in his power to discharge himself by granting it over." There are many cases to the same effect, but it will be sufficient for us to cite the case of *Owings v. Jones*, 9 Md. 108, where the court adopt this rule laid down in 56 E. C. L. R. 784:

"Where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then whether in or out of possession he is liable."

A wharf, furnishing the only mode of ingress and egress to a summer resort, where crowds were invited to come, if in an unsafe and dangerous condition, is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition, or having by the exercise of any reasonable care the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts, must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors.

This question has been much discussed in the courts of New York. *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295, was a case very much like the present. There the court decided that if the owner of a pier had leased it, and at the time of the demise, and delivery of possession to the lessee, it was in an unsafe and defective condition, and afterward, while in the possession of the lessee, an injury happens to one lawfully on the pier, the lessor is liable. This decision has not been overruled in that State. The case of *Edwards v. N. Y. and H. R. R. Co.*, 98 N. Y. 245; s. c., 50 Am. Rep. 659, is very different from *Swords v. Edgar*, and in commenting upon the latter case the court says: "It is one where liability was imposed upon the lessor of a public dock, upon the ground that he had suffered a nuisance in his dock before the demise, and he was

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held liable on that ground. And the ground of nuisance is the only one upon which that decision can stand. There are similar cases in New England and England. A dock is regarded as a species of public highway, and the owner who suffers a nuisance to be created and continued upon his dock remains liable upon the ground of nuisance." The case in 98 N. Y., was this : The defendant rented a hall for the purpose of giving in it a pedestrian exhibition. A gallery broke down during the exhibition and injured the plaintiff. The court held that in the absence of evidence tending to show that the defendant knew, or had reason to suppose, that there was some defect in the gallery, or that it was of insufficient strength to hold the number of people who could be contained therein, or that it would be used in such a way as to endanger its security, the plaintiff could not recover. The gallery had been divided into boxes, which were filled with chairs and tables, and had been used for festivals, etc. But the lessee had removed the chairs and tables, and a turbulent crowd had filled the gallery, and in stamping and beating time to the music, they broke it down. There was no evidence whatever that the lessor knew, or could have known, that it was to be so used, and he was held not liable.

We cannot perceive any inconsistency in this case with *Swords v. Edgar*. We have referred to them at some length because they were pressed in the argument.

But in any event, we think the case of *Owings v. Jones*, 9 Md. 108, a controlling authority, based, as we think it is, upon sound reason, and we think it may be held as well settled in this State, that where the owner of a wharf leases or rents it out, and at the time of such renting the wharf was in an unsafe condition for the use that the lessor knew it was to be put, and that the owner knew, or by the exercise of reasonable diligence could have known, of its condition, and that one who was lawfully on the wharf was injured in consequence of its condition, that the owner is liable.

This was substantially the instruction of the court, and the judgment must be affirmed.

Judgment affirmed.

Fire Ins. Association of England v. Merchants and Miners' Transportation Co.

**FIRE INSURANCE ASSOCIATION OF ENGLAND v. MERCHANTS
AND MINERS' TRANSPORTATION COMPANY.**

(66 Md. 388.)

Insurance — interest — property in hands of carrier.

Where a carrier insured goods in his possession on storage for carriage, "for account of whom it may concern," *held*, that although he was not responsible for their safe-keeping, he might maintain an action for loss, after his own loss had been paid, for the benefit of the owner adopting the policy after loss.

ACTION on an insurance policy. The opinion states the case. The plaintiff had judgment below.

Frank Gosnell and Charles Marshall, for appellant.

Wm. Pinkney Whyte, for appellee.

MILLER, J. This appeal is from a judgment for \$4,777.49, recovered by the appellee against the appellant in an action on an insurance policy, issued by the latter to the former on the 1st of November, 1883. The case was tried before the court without a jury, and two exceptions were taken, one to the admissibility of evidence, and the other to rulings upon propositions of law. Of the two main questions which these exceptions present for review, one goes to the right of recovery to any extent, and the other raises the question of contribution under the seventh condition of the policy.

The written part of the policy is that the fire association "in consideration of \$30, to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure the Merchants and Miners' Transportation Company, for account of whom it may concern, against loss or damage by fire to the amount of \$5,000, on merchandise, being chiefly cotton in bales, its own, or in its care or custody as carriers, and for the amount of earned freight and charges, if any, thereon, stored in the frame metal roof freight shed of the Norfolk and Western Railroad Company, situate nearest the water front of its wharf and dock, at the lower end of Main street, in Norfolk, Virginia, and marked No. 1 on diagram; loss, if any, payable to Geo. J. Appold, Treasurer Mer-

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chants and Miners' Transportation Company, for account of whom it may concern. Other insurance permitted." By the printed terms immediately following the insurer agrees "to make good unto the said assured, their successors, executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the 31st day of October, 1883, to the 31st day of December, 1883; the amount of loss or damage to be estimated according to the actual cash value of the property, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in Philadelphia." It is not necessary to state, at present, any of the other provisions or conditions of this instrument.

The circumstances which led to this insurance are substantially as follows: The Merchants and Miners' Transportation Company is a common carrier by water, and in October and November, 1883, was engaged in transporting cotton from Norfolk to ports in the New England States. The firm of Inman & Co. had purchased cotton for certain New England cotton mills, at Atlanta, and other points in the cotton growing States, and as consignor was forwarding the same to the mills, *via* Norfolk. This cotton arrived by rail at Norfolk, in large quantities during the latter part of October and the first of November, and the transportation company had difficulty in procuring steamers or vessels to carry it on to its destination, and it was stored in one of the freight sheds of the railway company at its wharf to await transportation. In this state of things, the transportation company took out this policy, together with twenty-two others of like character, but of different amounts in twenty-two other fire insurance companies. The aggregate of insurance thus effected was \$50,750, and the premiums paid therefor amounted to \$299.75. After these policies had been issued and while the cotton remained thus stored, the carrier company by its agent executed a receipt for the same on the 6th of November, so that it then came within the terms of the policy as being in the "care or custody" of the assured "as carriers." On the 14th of November, a fire occurred in this freight shed, by which one thousand and ten bales of this cotton were destroyed or injured. How the fire originated is not explained except in the preliminary

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proof of loss by Mr. Appold, the president of the assured, who states he believes it was from a spark emitted by a tug or steamer in the adjacent river, and in the absence of other proof on the subject we must assume it was from this or some unknown cause. The value of the cotton thus burned, exclusive of salvage, was between \$47,000 and \$48,000. No part of it was owned by the carriers, and the cotton mills who were the owners and consignees thereof held open or floating policies in other companies under which they insured their cotton while in transit from the place of purchase to the mills. These have been termed in argument marine policies, and we shall refer to them again. It turned out at the trial that when these carriers received the cotton, they received it under the terms of a bill of lading by which they were exempt from loss by "fire from any cause on land or water," and consequently they were not liable over to the owners for this loss. There was no "earned freight," and before this suit was brought they had been paid by the insurers all that they had demanded in the shape of "charges" and expenses. The suit therefore must be prosecuted, if at all, solely for the benefit of the owners, and whatever is recovered must go to them.

1st. Upon these facts the question arises can the suit be maintained? In our opinion it can, and we shall state briefly the grounds of that opinion. It has been decided by this court, and upon abundant authority, that a person having goods in his possession as consignee, or on commission, may insure them in his own name and for their full value, and in the event of loss, recover the full amount of the insurance, and after satisfying his own claim hold the balance as trustee for the owner. *Hough v. People's Fire Ins. Co.*, 36 Md. 432. The law as thus stated is, of course, based upon the assumption that the assured had an insurable interest in the property at the time of the insurance, and we are inclined to the opinion that this transportation company had such interest, at least in respect to "charge" and freight expected to be earned, notwithstanding it had no pecuniary interest in or ownership of the cotton itself, and was not liable over for its loss by fire. But however that may be, the law goes further, and it is now well settled that where a person has the custody, care or possession of property for another and bears the relation to it of consignee, carrier or factor, warehouseman or bailee, he may, though he has no pecuniary interest therein, and is not responsible for its safe-keeping, insure it in his

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own name for the benefit of the owners, and the insurance will inure to their benefit upon a subsequent adoption of the insurance even after the happening of a loss under the policy. 1 Wood Fire Ins. (2d ed.), §§ 293, 294. And this must be so, otherwise policies "for account of whom it may concern," which are frequently taken out by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and though more frequently used in marine insurance, are sometimes found in other policies, and it has become elementary law in regard to them, that extrinsic evidence may be adduced to show who was in fact the party concerned, and any one having title to the property at the time of loss may, by adoption of the contract, avail himself of its advantages provided it be shown that his interest was within the contemplation of the party procuring the insurance. The fact that the interest of the owners was contemplated by the insurer in this case seems apparent from the contract itself, when read, as it must be, in the light of the surrounding circumstances already stated. That this carrier company should have effected insurance against fire "for account of whom it may concern," and to an amount exceeding \$50,000 on this cotton, when they did not own a bale of it and were not responsible for its loss by fire, without intending to protect thereby the interest of the owners, is almost incredible. The inference that they did so intend is strong if not irresistible. But at all events the proof is quite sufficient to warrant a jury in finding such intent. Nor is there any doubt but that these owners had an insurable interest when the loss occurred, for they were the absolute owners of the cotton then as when the insurance was effected. Have they then adopted this policy? As was said by the Supreme Court in a case where a similar policy was under consideration: "The adoption of the policy need not be in any particular form. Any thing which clearly evinces such purpose is sufficient." *Hooper v. Robinson*, 98 U. S. 537. Adoption is a question of fact, and all we need say on this point is that we think there is enough in this record to have authorized a court to submit that question to the finding of a jury.

But counsel for the appellant contend that by the terms of this policy the obligation of the insurer to make good the loss insured against is expressly limited to the interest of the assured. The argument in support of this position is ingenious, and is founded upon what counsel insist is the true grammatical construction of

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that part of the printed portion of the policy above quoted. According to this construction they contend that the terms "except as herein provided" refer to the "loss or damage," in the previous part of the sentence, and that their office is simply to exclude therefrom such loss as by subsequent conditions the insurer was exempted from paying, and that they in no wise modify the preceding terms which limit the amount to be paid to a sum "not exceeding the interest of the insured in the property." But this reading would, as it seems to us, be in conflict with the intention of the parties as expressed in the written part of the instrument, and we have already said that this part, read in connection with the surrounding circumstances, manifests an intention to insure more than the mere interest of the insured carrier. There is ample authority, as well as good sense, for the position that where the written and printed portions of a policy conflict, effect must be given to the former, because being incorporated into the contract at the time it was made, it is presumed that it expresses the actual agreement of the parties, and that they intended thereby to override that portion of the contract expressed in type which is inconsistent therewith. 1 Wood Ins. (2d ed.), § 58. But it is not necessary in this case to go to the extent of adopting the law as thus stated, for we think the terms "except as herein provided," in the connection in which they stand, are quite susceptible of being read as referring to the written as well as to the subsequent printed portions, and as modifying the immediately preceding terms limiting the extent of liability. So read they remove all conflict, and effectuate the intention of the parties as expressed in the written part, and this construction would seem to be sanctioned by the rule laid down of old by Lord HALE that "judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties; they will not therefore cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfill the intent than destroy the intent by reason of the insufficiency of the words." *Crossing v. Scudmore*, 2 Lev. 9. Courts are no more inclined now, than they were in the days of Lord HALE, to draw fine distinctions, or be nice about the grammatical construction of sentences whether in insurance contracts or others, in order to sustain a defense in which there is no merit.

We regard this policy as an insurance upon specific goods stored in a specified place, under which the interest of the owners, if prop-

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erly asserted, can be protected. If therefore a jury, or a court acting as a jury, should find in their favor the facts which we have said must, under the proof in this record, be left to such finding, the action can be maintained, and from this it follows that the court below was right in rejecting the defendant's first and seventh propositions or prayers. We are also further of opinion, that under the circumstances disclosed in the record, the plaintiff was in no default in furnishing the preliminary proofs of loss, and that there was evidence in the case which afforded sufficient means of determining the amount, if any, the plaintiff was entitled to recover. There was consequently no error in the rejection of the defendant's second and tenth prayers.

[Omitting other points.]

Judgment reversed and new trial awarded.

**CHESAPEAKE AND POTOMAC TELEPHONE COMPANY V. BALTIMORE
AND OHIO TELEGRAPH COMPANY.**

(66 Md. 399.)

Telegraph — telephone — discrimination.

A telephone company being bound by statute to receive dispatches from and for all telegraph companies, may not justify a discrimination in favor of a particular telegraph company by the fact that its contract with the company controlling the telephone patents requires it to do so. (*See note, p. 173.*)

MANDAMUS. The opinion states the case.

Chas. J. M. Gurvin and *Wager Swayne*, for appellant.

E. J. D. Cross and *John K. Cowen*, for appellee.

ALVEY, C. J. This was an application by the appellee, a telegraph company, to the court below for a *mandamus*, which was accordingly ordered, against the appellant, another telegraph company, but doing a general telephone business.

The appellant is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. In this case, the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph

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line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them; but they have no power to discriminate, and while offering ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within this State (which as we have seen includes a telephone exchange), "to receive dispatches from and for any telegraph lines, associations or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And such being the plain duty of those owning or operating telegraph lines, or telephone lines and exchanges, within this State, they cannot be exonerated from the performance of that duty by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the legislature of the State has full power to regulate and control, within reasonable limits at least, public employments and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce, and the affairs, both public and private, of the country, their operation therefore in doing a general business, is a public employment,

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and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And such being the case, the owner of the property thus devoted to public use, must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of *Munn v. Illinois*, 94 U. S. 113, and which has been followed by subsequent cases. In the recent case of *Hackett v. State*, 105 Ind. 250; s. c., 55 Am. Rep. 201, where the cases upon this subject are largely collected, it was held, applying the principle of *Munn v. Illinois*, that it was competent to the State to limit the price which telephone companies might charge for their patented facilities afforded to their customers. And if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.

But while not controverting the general principle stated, it has been strongly urged in argument for the appellant, that the ownership of the American Bell Telephone Company of all telephone apparatus, constructed by that company or its agents, being absolute and exclusive, it had the right in granting any license to use this apparatus to limit such use by any conditions which it saw proper to impose upon the licensee. That in this case the licensee acquired but a limited right and that it could impart no greater right to a subscriber to the Exchange than that possessed by the licensee itself.

It is certainly true, as contended by the appellant, that the letters-patent granted to Bell conferred upon him, his heirs and assigns, for a limited time, a monopoly in the invention or discovery patented, and the exclusive right to make, use and vend the tangible property brought into existence by the application of the principle of the discovery or invention, for which the patent issued. But it does not follow that those letters-patent conferred upon him, or his assignees, any such exclusive right to apply or use the tangible property produced in a manner that other property could not be lawfully used. The license to use the telephone instruments in conducting and operating a telephone exchange at once dedicated or devoted the instruments, to the extent of the requirements of that system or exchange, to public use; and so soon as the office of exchange was opened to the public, the instruments employed be-

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came instruments of public service, and like all other property employed in the service, became subject to public regulation and control. And the fact that those instruments were the product of a patented invention or discovery, and the licensee had agreed to use them in serving the public with certain restrictions, inconsistent with the public regulation, can in no way, nor to any extent, relieve the party in control of the Exchange from the full discharge of his duty under law.

In the case of *Patterson v. Kentucky*, 97 U. S. 501, it was held that where, by the application of the invention or discovery for which letters-patent had been granted, tangible property had come into existence, its use was, to the same extent as that of any other species of property, subject to State control and regulation. In delivering the opinion of the court in that case, Mr. Justice HANLAN said: "These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." The same doctrine was reiterated in the case of *Webber v. Virginia*, 103 U. S. 344, 348.

Now applying to the case the principles stated, it would seem to be clear that there is nothing in the rights secured by the letters patent to Bell, and now held by the American Bell Telephone Company, nor in the contracts referred to, that justified the appellant in attempting to impose upon the proposed subscription to the Exchange by the appellee, the restrictive conditions to which we have referred. By insisting upon such restrictive conditions there was an unjust discrimination made against the appellee and in favor of a competing company. It was to prevent such discrimination that the law was enacted to which reference has been fully made.

The question presented in this case, and which we have decided, has been presented and decided by other courts of the country,

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though not with entire unanimity. In Ohio, under a statute very similar to our own, the question was presented in the case of *State v. Telephone Co.*, 36 Ohio St. 296; s. c., 38 Am. Rep. 583. In that case the Supreme Court held, that under the statute requiring that telegraph companies should receive dispatches from and for other telegraph lines and from and for individuals, and transmit them with impartiality and good faith, a contract between the telephone company and the owner of telephone instruments, providing that the company in the use of the instruments should discriminate as between telegraph companies was void, and therefore could furnish no justification for the attempted discrimination.

In Connecticut however, under a statute somewhat similar to our own and that of Ohio, a different conclusion was reached, in the case of the *American Rapid Telegraph Co. v. Conn. Telephone Co.*, 49 Conn. 352; s. c., 44 Am. Rep. 237. In that case the court denied the force of the statute, as applied to the owner of the patented instruments, although such instruments were licensed to be used by the local telephone company. That case was strongly pressed in the argument before us, but we have not been able to yield to its authority, though certainly entitled to great respect.

In Pennsylvania, where a statute similar to ours exists, it has been recently held by the Supreme Court of that State, in the case of *Bell Telephone Co. v. Commonwealth, ex rel. Bell. & Ohio Telegraph Co.*, affirming the judgment of the court below for the reason assigned by it that the restrictive or discriminating clause in the contract of the 10th of November, 1879, was simply void as against public right. That the telephone company, holding a license for the use of patented devices, could not discriminate against a telegraph company, seeking to use the telephone system in its business of receiving and delivering telegraphic messages. In the opinion adopted by the Supreme Court, there are several other well reasoned opinions referred to, maintaining the same conclusion as to the right of the public, upon principles of the common law, irrespective of statute. Those decisions are founded upon the doctrine of *Munn v. Illinois, supra*, referred to in a previous part of this opinion.

There were some objections taken to the sufficiency of the allegations in the petition for *mandamus*, and they were ingeniously pressed in argument before this court. But we do not think the objections well founded. It is clear that *mandamus* is the proper

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remedy in a case like the present, and we think there is sufficient ground shown for it in the petition.

With the views expressed, this court is of opinion that the order of the court below, directing the writ of *mandamus* to issue, should be affirmed, with costs.

Order affirmed.

NOTE BY THE REPORTER.—In *Bell Telephone Co. v. Com., ex rel. Baltimore & Ohio Telegraph Co.*, Supreme Court of Pennsylvania, April 19, 1886, it was held that a telephone company must upon an offer of compensation in the usual rates serve the public impartially and without discrimination. The Common Pleas, ARNOLD, said: "The agreement, it will be seen, provides for licenses from the telephone company to the Western Union Telegraph Company, on terms to be established from time to time, which shall be as favorable to that telegraph company as to any other parties for like uses, thereby recognizing the duty of the respondent and its licensor to deal equally with all, and binding it to that duty by express contract. All the telephone patents, it is claimed by the respondent, are now owned by the American Bell Telephone Company, and no person can use them except under contracts or licenses from that company. The Western Union Telegraph Company has given up its claim to all such patents, and the American Bell Telephone Company has put them into public use, and thereby subjected them to the rule that when the use of a patented device is thrown open to the public, or to classes of the public, all are entitled to use it on the same terms as other persons in the same class. The rules which govern common carriers apply to it, and those rules prohibit any discrimination to be made. This is the rule of the common law as enforced in many adjudged cases, of which *Sanford v. Railroad Co.*, 24 Penn. St. 378, may be referred to as a conspicuous and pertinent example. In that case it was decided that a contract giving to one express company an exclusive right of transportation in the passenger trains of the railroad company is illegal and void. The law on this subject is placed beyond successful dispute by the third clause of section 33 of the Corporation Act of 1874, which enacts that 'the said telegraphic corporation shall * * * receive dispatches from and for other telegraph lines and corporations, and from and for any individual; and on payment of their usual charges to individuals for transmitting despatches, as established by the rates and regulations of such telegraph line, transmit the same with impartiality and good faith, under penalty of \$100 for every neglect or refusal so to do,' etc. And that telephone companies are included within this clause is shown by the case of *Attorney-General v. Edison Telephone Co. of London*, reported in 6 Q. B. Div. 244; s. c., 39 Eng. Rep. 602 (A. D. 1880), in which English statutes relating to telegraph companies enacted in the year 1863 and 1869, before the telephone was patented or perhaps invented, were held to apply to telephone companies. Besides the respondent was chartered under the act of 1874, which gave it a legal existence and prescribed its duty at the same time. It cannot transact business in this State but for that act, and operating under that act, it must deal equally with all, with impartiality and good faith, and without discrimination in favor or against any one.

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The conclusion to which we have come by the foregoing reasoning is supported by the authority of several adjudged cases.

"In the case of *State of Ohio*, on the relation of the *American Union Telegraph Co.*, and the *Baltimore & Ohio Railroad Co. v. Bell Telephone Co.*, the *Columbus Telephone Co.* and the *Western Union Telegraph Co.*, reported in 86 Ohio St. 296; s. c., 38 Am. Rep. 583 (A. D. 1890), an application was made to the Supreme Court of Ohio for a *mandamus* to compel the Columbus Telephone Company to place a telephone in the office of the relators for the use of their telegraphic department. The (American) Bell Telephone Company, although a party, does not appear to have been served, nor did it join in the answer filed. The defense was that the license by the American to the Columbus Telephone Company contained the same restriction which is in controversy in this suit, that the Columbus Telephone Company would not permit the transmission of general business messages, market quotations or news for sale or publication, and that it would turn over all such messages to the licensor, the American Bell Telephone Company, unless otherwise directed by its customers, but that it would not solicit such directions, nor receive pay for transmission over other lines, unless compelled by law to do so, thereby showing the doubt of the parties to the contract as to its validity. There is in Ohio a statute similar to our Pennsylvania statute, requiring telegraph companies to receive dispatches from and for other companies and individuals, and to transmit the same with impartiality on payment of the usual charges. The court held that the contract to the effect that discriminations should be made between telegraph companies is void as against public policy as declared by the statute, and awarded the *mandamus*.

"The case *State of Missouri, ex rel. American Union Telegraph Co., v. Bell Telephone Co. of Missouri*, in the Circuit Court of St. Louis, reported in 10 Cent. L. J. 438, and 11 Cent. L. J. 357; also in 23 Alb. L. J. 863 (A. D. 1890). In that case there were clauses in the license of the respondent which provided that its patrons should not use the telephone for transmitting messages for which toll is paid to any one but the respondent, nor for transmitting market quotations or news for sale or publication; that it should not connect any of its officers with any telegraph office or line, and that no telegraph company should be allowed to become a subscriber. Judge THAYER held that this second clause would compel the respondent to discriminate against a class of individuals or corporations, which is contrary to law and to public policy. A public servant cannot avoid the performance of any part of the duty it owes to the entire public, by a contract even with the patentee of an invention. Doubtless a condition limiting the use which should be made of the telephone affecting all classes of citizens, and discriminating between none, might be valid; but having the right to use the telephone the relator might use it for the same purposes that other subscribers use it.

"The principle was also enforced in the case of the *Louisville Transfer Co. v. American District Telephone Co.*, in the Louisville Chancery Court, reported in 14 Chicago Legal News, 15, and also in 24 Alb. L. J. 298 (A. D. 1881). In that case the plaintiff carried on a passenger transfer business in public omnibuses and carriages, and the defendant operated a telephone exchange, and

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organized as part of his business a system of public transfers by carriages and coupes. The defendant had placed a telephone in the plaintiff's office, and threatened to remove it, whereupon the plaintiff applied for an injunction. Chancellor EDWARDS held that the defendant, being engaged in two distinct employments, one the operating of a telephone exchange and the other a carriage service, there was no rivalry between the plaintiff and the defendant in the telephone business, as to which the defendant occupied the same position toward the plaintiff as toward the rest of the public, and the defendant, being a *quasi* public servant, is bound to serve all alike and impartially on the principles of the law of common carriers.

"The last reported case in which the same conclusion was reached is that of *State of Missouri, ex rel. Baltimore & Ohio Telegraph Co., v. Bell Telephone Co. of Missouri*, in the Circuit Court of the United States for the Eastern District of Missouri, reported in 24 Am. Law Reg. 573, and 8 Am. & Eng. Corp. Cases, 7 (A. D. 1885). It will be noticed that the plaintiff in that case is the plaintiff in the case now before us, and the defendant was in the same position as the defendant in this case, and it rested its defense on the same ground — a contract with the American Bell Telephone Company that it would not establish telephonic connection with any telegraph company, unless permitted by the American Bell Telephone Company. It also appeared that telephonic communication had been permitted to the Western Union Telegraph Company. Judge BREWER held that the telephone company, having put its patents into public use, or the channels of commerce, as he expresses it, the property is put within the power of the court for enforcing the obligations of a common carrier. It is true the judgment was given by a divided court, but Judge TREAT placed his dissent on the ground that the American Bell Telephone Company, not being a party, in his opinion a valid judgment could not be given.

"The Supreme Court of Connecticut has decided the question the other way, notwithstanding there is a statute in that State and also in Massachusetts similar to those of Ohio and Pennsylvania. *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352 (A. D. 1881); s. c., 44 Am. Rep. 237.

"In the case before us the American Bell Telephone Company is not a party, and we do not think it indispensable that it should be. We are not called upon to expound or enforce the contract between that company and the Philadelphia company. What we are called upon to do is to declare that the illegal portions of their contract cannot be enforced in this State; that those portions are void and against public policy as declared both by the common law and by statute; and that the respondent cannot shield itself from the performance of its duty to serve the public impartially and without discrimination by a contract with a party not within the State. We deal with parties carrying on a public business within our borders under the protection of our laws, to compel them to comply with our laws. They cannot obtain immunity from their obligation to treat all alike by pleading a license from parties beyond our grasp. The owner of a patent may put it in public use or withhold it, as he chooses; but if he does put it in public use, then as was well said by Chief Justice MCLVAIN, of Ohio, 'the manner of its use may be controlled and regulated by State laws when the public welfare requires it.' The patent gives

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him a monopoly by protecting him from the competition of other persons in the business secured by the patent, but it does not permit him to make discriminations against persons who are willing to pay the same rates which other persons are charged for the use of it."

This opinion was affirmed by the Supreme Court without discussion.
See note, 44 Am. Rep. 241.

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(86 Md. 419.)

Evidence — opinion — safety of highway.

The safety of a highway is a proper subject of opinion-evidence. (*See note, p. 176.*)

ACTION for personal injuries by a defective road. The opinion states the case. The plaintiff had judgment below.

Samuel Snowden, for appellant.

Joseph C. France and Fielder C. Slingsluff, for appellee.

YELLOTT, J. A suit for the recovery of damages was instituted in the Court of Common Pleas of Baltimore city, by the appellee against the appellant, and from the judgment rendered in that cause this appeal has been taken. As shown by the record the appellant, a body corporate, owns a turnpike road and is authorized by its charter to exact and receive the payment of toll for travel over said road. On the night of the 6th of November, 1885, the appellee, while driving a coach, was injured by the vehicle being overturned and thrown down a declivity on the side of this road. The plaintiff averred in his declaration, and offered evidence tending to prove that the accident resulted from the neglect of the defendant to keep the road in a safe condition for travel. The defendant adduced proof for the purpose of showing that there was no negligence on its part, and that the proximate cause of the injury was to be found in the fact that the plaintiff was driving a pair of horses, one of which was young and refractory, and that this animal became frightened and forced the coach over the declivity. There was much conflict of testimony, but the jury, enlightened by the instructions of the court, found for the plaintiff.

[Minor matter omitted.]

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The first bill of exception which has not been abandoned was taken to the admission of the testimony of a witness who said he was well acquainted with the road, and described its condition from his own observation. He was then asked: "Please state whether or not in your opinion, from what you saw of the road, it was safe to travel at that point by wagons or carriages?" It was contended that this was an attempt to place the witness in the position of an expert. But this objection does not rest on any substantial basis. Experts are persons who have technical and peculiar knowledge in relation to matters with which the mass of mankind are supposed not to be acquainted. Thus a vessel is intended to be navigated by one having nautical experience, and cars on a railroad are under the management of those who are supposed to have acquired knowledge and skill in the control of trains. It is manifest that mere passengers cannot be experts in relation to these modes of locomotion, although they may testify to the existence of facts coming within their observation. But macadamized roads are constructed for all persons to ride and drive over, and the most timid traveller does not deem it necessary to carry an expert in his carriage to designate the dangerous places. Even animals will sometimes notice such places and avoid them; and any human being who has the use of his organs of vision, and is possessed of an intellect above the grade of idiocy can tell when a particular place in a road is dangerous or otherwise, and is therefore competent to testify as to its condition; the value of his testimony being for the consideration of the jury. In *Crowther's* case, 63 Md. 568, this court said: "Whether this bank or declivity rendered the road unsafe for travel was a matter about which men of ordinary intelligence could speak as well as experts in road-making, and the testimony of such witnesses is often resorted to in such cases."

Judgment affirmed.

NOTE BY THE REPORTER.—In *Baltimore and Yorktown Turnpike Road v. Crowther*, 63 Md. 568, the court said: "In the first exception the plaintiff asked Mr. McLean, the surveyor, who had made a plat of the road at the place of the accident, whether in his opinion, from what he saw of it, the road there was safe for travel by wagons and carriages? The court allowed this question to be put, and we discover no error in this ruling. The witness was not produced as an expert, nor was this a matter in which the testimony of experts was needed. Whether this bank or declivity rendered the road unsafe for travel was a matter about which men of ordinary intelligence could speak as well as experts in road-making, and the testimony of such witnesses is often

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resorted to in such cases. *Beatty v. Gilmore*, 16 Penn. 463; s. c., 55 Am. Dec. 514; *Taylor v. Town of Monroe*, 43 Conn. 49."

In *Taylor v. Town of Monroe*, 43 Conn. 44, it was said: "The next question is, whether the opinions of the 'two professional road-builders of twenty-five years' experience in the business,' who 'had seen and examined and described the road and bridge and railing and their surroundings at the place where the injury happened,' ought to have been received in answer to the four special interrogatories mentioned in the record.

"If these witnesses were experts and the subject-matter was proper for their opinion, it must be conceded that the evidence ought to have been received in answer to at least three of the questions stated.

"A special objection is made to the third inquiry, that it involves the absurd proposition as a defense, 'that through the negligence of the defendants the plaintiff was saved a still more severe injury.'

"But we do not so construe the purport and purpose of this question. We think the object was to show that the road was reasonably safe as it was, that the safety and convenience of public travel did not require such a railing as the plaintiff claimed should have been erected, because taking her line of travel, the effect would have been, not to diminish, but to increase the danger.

"The rule as to experts is, that 'in cases involving questions of science and skill, or relating to some art or trade, experts are permitted to give opinions; the principle embraces all questions except those, the knowledge of which is presumed to be common to all men. So the business which has a particular class devoted to its pursuit is an art or trade within the rule.' *Rochester & Syracuse R. Co. v. Budlong*, 10 How. Pr. 289.

"Though the rule as stated is well settled, yet there is often a practical difficulty in applying it to the facts and circumstances of the particular case, especially where the general subject-matter, as in this case, is open to the observation of many persons. If this case falls pretty near the line, we think it is clearly on that side of the line that permits expert testimony.

"The true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.

"In *Smith v. Gugerty*, 4 Barb. 614, it was held that a mason, as an expert, might be asked, 'how long it would take to dry the walls of a house, so as to render it fit and safe for human habitation.' Here it is obvious that a great many persons would have some knowledge of the subject, and it could be plausibly argued that those persons who had prematurely moved into newly constructed houses would be the proper experts, if any. In the case at bar the plaintiff claims that 'persons who use roads, and not those who build them, are the proper experts.' The similar objection suggested in the case just cited would have a better foundation than it has here, because persons who use roads do not necessarily have their attention called to points of safety or danger in the construction of the road; and moreover the users of a road do

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not constitute any recognized class devoted to any business, trade, art or profession, connected with such use, which could give any value to their opinions.

"But road-builders must of necessity adapt their work to the purposes for which it is intended, to-wit, the safety and convenience of public travel, and in so doing they must keep in mind all the elements that enter into the question of safety and convenience, and thereby they acquire a peculiar knowledge and experience that gives special value to their opinions upon the subject.

"The plaintiff further claims that the precise spot to which the questions referred was susceptible of accurate description by measurement and therefore expert testimony was inadmissible. We do not accept this position as correct in this case. The question whether a highway is so raised above the adjoining ground as to require a railing to make it reasonably safe, might be so determined in extreme cases, as where the descent from the shoulder of the road to the adjoining ground is very abrupt and great, or where, on the other hand, it is very slight. But in ordinary cases it could not be so determined. There is no arbitrary rule that so many feet of descent on the side, coupled with so many feet of width in the travelled way, will make a railing necessary, neither can it be determined by the mere fact that a wagon could be upset by going into the ditch on the side of the road.

"The elements that enter into the question of reasonable safety are numerous and often difficult to be described; and for this reason it has long been the practice in this State to admit even the opinions of non-experts, founded upon their own personal knowledge and in connection with facts stated by them, upon questions 'whether a road is or is not in repair, or whether a bridge is sound and safe,' etc. *Dunham's Appeal from Probate*, 27 Conn. 192, opinion by ELLSWORTH, J., p. 198."

In *Beatty v. Gilmore*, 16 Penn. St. 463, such evidence was held competent. "It was in truth, rather the assertion of a fact, dependent in some measure upon opinion, than of an abstract opinion without more. It is a species of testimony always resorted to in cases like the present. * * * The books furnish many similar examples. In *Jones v. Boyce*, 2 E. C. L. 483, a witness testified, 'I should have jumped off of the stage had I been in the plaintiff's place, as the best means of avoiding the danger.' In *Jackson v. Follett*, 3 E. C. L. 283, evidence was given to show that the coachman *had adopted the most prudent course*, in turning out of the middle of the road to avoid a wagon, in doing which the plaintiff's leg was broken. In *Brewer v. Williams*, 11 E. C. L. 487, where a coach proprietor was sued for an injury occasioned by the alleged insufficiency of the coach, a coach-maker who had repaired it was received to swear that he had *every reason to believe it safe*. In *Drew v. New River Co.*, 25 E. C. L. 634, a case like that before us, the plaintiff proved by ten witnesses that mould and stones, taken out of a trench dug by the defendant's servants, were so laid as to *make it unsafe* for persons walking along. And finally, in *Wilkes v. Hungerford Market*, 29 E. C. L. 336, an action for a nuisance in stopping up a street, witnesses were called to prove that the complaint was not of the buildings the defendants were authorized to erect, but by keeping up the obstruction in an *unreasonable and unnecessary manner*."

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In *City of Parson v. Lindsay*, 26 Kans. 426, it was said: "The first point made in this court by the plaintiff in error, defendant below, is that the court below permitted the defendant in error, plaintiff below, over the objections of the defendant, to introduce in evidence the opinions of several witnesses that the street-crossing where the accident occurred was unsafe and dangerous. No attempt was at any time made to show that these witnesses were experts, or that they possessed any peculiar skill or knowledge with reference to street-crossings. They however had seen the street-crossing where the accident in this present case had occurred. The plaintiff in error, defendant below, claims that this testimony was incompetent, and that the court below erred in permitting it to be introduced. We think the plaintiff in error is correct. *Barnes v. Incorporated Town of Newton*, 46 Iowa, 567; *City of Chicago v. McGieen*, 78 Ill. 347; *Lincoln v. Inhabitants of Barre*, 5 Cush. 590; *Bliss v. Inhabitants of Wilbraham*, 8 Allen, 584; *Ryerson v. Abington*, 103 Mass. 526; *Oleson v. Telford*, 37 Wis. 327; *Griffin v. Town of Willow*, 43 Wis. 500; *Benedict v. City of Fond du Lac*, 44 Wis. 595; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 81; *Muldrowney v. Ill. Cent. R. Co.*, 36 Iowa, 463; *Taylor v. Town of Monroe*, 43 Conn. 36; *Monroe v. Lattin*, 25 Kans. 351; 2 Thomp. Neg. 790 *et seq.*

"As a general rule the opinions of witnesses are not competent evidence, although such opinions may be derived from the witnesses' personal observation, and are sought to be given in evidence in connection with the facts on which they are based. To this rule there are some exceptions. In matters relating to skill or science, such persons as have had sufficient experience, or who are possessed of sufficient knowledge, and who are usually denominated experts, may give their opinions, whether they are personally cognizant of the facts or not. There are also some exceptions, seemingly founded upon convenience or necessity, and relating to such matters as involve magnitudes or quantities, or portions of time, space, motion, gravitation or value, and such as involve the condition or appearance of objects, as observed by the witness; and matters which from their limitless details, and the infirmity of language and memory, cannot well be stated by the witness, except in the form of an opinion. The present case however does not come within any of the exceptions, but comes within the general rule; and therefore it was error for the court to admit the evidence. Whether the crossing was safe or unsafe, depended upon very many circumstances. The crossing was evidently safe enough for an ordinary person to pass over it on a bright, cloudless, sunshiny day, while it was probably unsafe for a weak, infirm, decrepit person to pass over on a dark, rainy, moonless, starless night, without artificial lights, and on wet, muddy and slippery ground. Also the width and depth of the gutter, and the character of its sides as to hardness, softness, etc., must be taken into consideration. All these circumstances however should have been given to the jury, and then the question, whether the crossing was safe or unsafe, should have been left to the jury to determine."

In *Benedict v. City of Fond du Lac*, 44 Wis. 495, it was said by RYAN, C. J.: "There are extreme cases in which the dangerous character of a highway is so great and so manifest that courts are warranted in holding it unsafe, as a matter of law. *Prideaux v. Mineral Point*, 43 Wis. 513. So of its sufficiency

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also. *McMaugh v. Milwaukee*, 32 Wis. 200. But generally the sufficiency of a highway is a mere question of fact, to be determined by the jury upon evidence of its actual condition. *Draper v. Ironston*, 43 Wis. 696. The opinions of witnesses of its sufficiency or insufficiency are inadmissible. *Montgomery v. Scott*, 34 Wis. 838; *Oleson v. Tolford*, 37 Wis. 337; *Griffin v. Willow*, 43 Wis. 509. Possibly there might be cases in which the opinions of experts might be admissible upon matters going to the sufficiency of a highway. Generally however it is a pure question of fact, not of science or skill.

"In the present case, the court below excluded the opinion on the sufficiency of the highway of one who had been a civil engineer, but who did not appear to have had such skill or experience in the construction of highways as to make him an expert. In the language of Mr. Justice COLE in *Oleson v. Tolford*: 'It seems to us the opinion of the witness was asked in respect to a matter involving no professional skill, and about which the jury were to make their own inferences and form their own judgments.' Or as the same learned judge says in *Montgomery v. Scott*: 'From the nature of the case, the jury were quite as competent to form a judgment as to the sufficiency or insufficiency of the highway, from facts submitted on the subject, as the witness could be.' There is therefore no error in the exclusion of the opinion of one witness, or in striking out the opinion volunteered by another, on the sufficiency of the walk here in question."

In *Kelleher v. City of Keokuk*, 60 Iowa, 473, the court said: "An affidavit filed in support of a motion for a continuance made by defendant, on account of the absence of a witness, alleged that defendant expected to prove by the witness that the sidewalk upon which plaintiff fell was at the time in 'good repair.' In order to avoid the continuance, plaintiff admitted that the witness, if present, would testify as stated in affidavit, but denied the competency of the evidence, and objected thereto upon the ground that the statement of the witness as to the condition of the sidewalk was an expression of opinion, and it was not shown by the affidavit or otherwise, that the witness was competent as an expert to state an opinion in regard to the condition of the sidewalk. We think the statement of the affidavit to the effect that the sidewalk was in 'good repair' is not the expression of an opinion, but of a fact discovered by the observation of the witness. Any person of ordinary intelligence is capable of observing the condition of a street or sidewalk, whether it be in good repair or bad condition. All persons living in or who frequent cities continually use the streets, and in passing along a sidewalk would ordinarily observe its condition. The testimony in question belongs to that class which relates to experience and observation as to affairs of every-day life, to which the attention of all are directed, and of which all are competent to speak. A witness, without a showing of his qualifications as an expert, may state conditions of the weather, the time of the day, the comparative distance which separates objects, the condition of the roads and streets, and the like, for the reason that matters of this kind are within the observation of all, and in speaking of them he does not express an opinion, but states facts learned from observation."

In *Brown v. Cape Girardeau Macadamized & Plankroad Co.*, 39 Mo. 153, it was said: "As the judgment will be reversed and the cause remanded for the

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errors above noted, it is proper to say that no error was committed in refusing to allow two witnesses to give their opinion as to whether the roadway was in such condition as to afford a safe and convenient track for the passage of wagons and teams. This was not a matter for expert testimony; it was for the jury to determine from the facts proven, whether it was or not in such condition."

In *City of Chicago v. McGloen*, 78 Ill. 347, witnesses were allowed to state "whether in their opinion, a glass, such as that which the evidence showed was inserted in the sidewalk at 511 Wabash avenue, was unfit to be used as a part of the walk, and was unsafe for such use." The court said: "It is the admission of such opinions in evidence, to which the objection is taken. The general rule is, that the opinions of witnesses are inadmissible as evidence; that they are to testify to facts, and the jury are to draw the inferences and form the opinions which are to govern the case. The present case is supposed to come within the exception to the rule, that on questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called *experts*, are permitted to give their opinions in evidence. But this is on the ground of necessity, when the facts in issue are not themselves accessible by evidence, and it is a matter of necessity to call in the experienced or instructed opinion of such witnesses. The opinions of witnesses should not be received as evidence, where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. *Clark v. Fisher*, 1 Paige, 174; *Mayor, etc., of New York v. Potts*, 24 Wend. 668; *Linn v. Sigbee*, 67 Ill. 75.

"Why was not the glass here, safe? Because of the slipperiness of its surface, especially when there was a little snow upon it. The question whether the glass was unsafe, by reason of the too great smoothness or slipperiness of its surface, was not a question of science or skill. The decision of that question required no special knowledge, and it was easily determinable by the jury, upon a sufficient description of facts pertaining to the glass, and the use of it in a sidewalk being given by witnesses. We do not perceive why mere proof of the naked facts could not enable the jury themselves to draw the inference whether the glass was safe or unsafe. The real question for the jury was not whether the glass was safe, but whether it was reasonably safe. The not improbable effect of obtruding upon the jury the opinions of these architects that the glass was unsafe might be that the jury would regard them as deciding the whole question and so accept them and repose on them as such, without further inquiry, and deciding for themselves whether the sidewalk might not have been reasonably safe. *Chicago & Alton R. Co. v. Springfield & Northwestern R. Co.*, 67 Ill. 148. We think these opinions should have been excluded."

In *Laughlin v. Street Ry. of Grand Rapids*, Michigan Supreme Court, July 1, 1886, it was held that opinions of persons familiar with highways and their use, concerning the safety or convenience of passage, are competent testimony in an action for damages for an injury caused by an obstruction of a highway.

CAMPBELL, C. J., said: "But we think it was error to refuse to allow persons familiar with driving to give their opinion, as eye-witnesses, concerning the safety of the crossing. No amount of description can enable a jury to see

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the place as the witnesses saw it, and while witnesses must describe the place as well as they can, it is always competent for those who are familiar with highways and their use, to give their impressions received at the time concerning safety or convenience of passage, and other conditions of an analogous nature. They are not strictly scientific questions, and come within familiar principles. *Evans v. People*, 12 Mich. 27; *Beaubien v. Cicotte*, 12 Mich. 459; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Underwood v. Waldron*, 33 Mich. 232; *Elliott v. Van Buren*, 33 Mich. 49, and note; *Pettibone v. Smith*, 37 Mich. 579; *Huizaga v. Cutler & S. L. Co.*, 51 Mich. 272."

MORSE, J., dissenting, said: "In this case I fully concur with the opinion filed by the chief justice, except in relation to the admissibility of evidence of the opinions of persons familiar with driving, and eye-witnesses of the condition of the track at or about the time of the alleged injury to plaintiff as to the safety of the crossing. The reception of such testimony would, in my opinion, open up a field of boundless speculation, which would tend to confuse and obscure rather than to throw light to the jury upon the question of the true condition of the street. It would also afford occasion and opportunity for perjury, limited only by the character and number of the witnesses who might be interrogated upon the subject. The admission of the evidence of the opinions of witnesses is always attended with danger, and is not tolerated by the law except in cases when such testimony is absolutely necessary in order to ascertain the truth of a fact to be determined. The truth or falsity of the opinion is necessarily concealed in the breast of the witness, and his perjury cannot be detected or punished.

"There is no reason for extending the rule as desired here. There is nothing about the track of this railway, the condition of the street, or the disposition of the ice and snow about and along the track, which is not within the common knowledge and experience of all who travel in the streets and highways of the cities and towns of our State; nor is there any thing about either the track, street or snow that cannot be sufficiently described by an eye-witness so that a jury can get an intelligent idea of their condition.

"The cases in this State cited by the chief justice in support of the proposition that this evidence of opinion as to the dangerous character of this crossing is admissible, do not seem applicable in my mind. *Evans v. People*, 12 Mich. 27, simply held that a person not a physician could give his opinion that there was no sickness at a certain time within six miles of a certain place. *Beaubien v. Cicotte*, 12 Mich. 459, holds that ordinary persons may give opinions as to the mental capacity of another. In *Detroit & M. R. Co. v. Van Steinburg*, it was decided that any one possessing knowledge of time and distance might give an opinion concerning the speed of a train of cars passing him. In *Underwood v. Waldron*, 33 Mich. 232, it was declared that in a case of injury to the foundation walls of a building by the disintegration of mortar caused by water, and when the question to be decided was whether such water came from inside or outside the walls, a witness might give his opinion in the matter, if in addition to his personal view of the disintegrated plaster of the wall, he saw other facts indicating that the water came from any particular direction, which facts and indications he must state to the jury. But if he only saw the plaster

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of the wall disintegrated and destroyed by water, with nothing but this to indicate whence the water came, he could give no opinion of its source.

"In the very extensive note to the case of *Elliott v. Van Buren* (Ann. ed.), 33 Mich. 49, where a large number of cases are cited bearing upon many questions where opinions have been admitted by this and other courts, there is not one where the dangerous or safe character of a highway, street or any other thing has been permitted to be proven by the opinion of a witness.

"In *Pettibone v. Smith*, 37 Mich. 579, a witness was allowed to testify as to the comparative flow of water in a stream, with which he was acquainted, in different years, and the supervisor was permitted to state the effect of dry seasons upon such streams in his township.

"The case nearest in point is that of *Huisega v. Cutler & S. L. Co.*, 51 Mich. 272. The following questions were there sustained: 'Question. State whether in your opinion the gearing that turns the slab rollers in an uncovered condition would be dangerous. Q. What would be the effect of a person coming in contact, or his clothing coming in contact, with that gearing — those cog-wheels?' It appears from the opinion that the objection was that of immateriality. SHERWOOD, J., in his opinion says: 'We can see no objections to these questions. Certainly the dangerous character of the machinery was one of the questions involved in the case, and the opinion of competent witnesses was admissible to show it, as well as what consequences might be expected if a person were to come in contact with it.' It does not appear from this opinion that the competency of this evidence was raised before the court, and if it was, the opinion does not declare upon what principle it was admitted. It certainly could not come within the principle contended for in the case at bar. This machinery and its character, and its operation, covered or uncovered, was not a matter of common observation or knowledge, open to all who witnessed it, as was the condition and character of this railway track and its approaches. Indeed the plaintiff recovered upon the express ground that he was ignorant of the danger, and not warned of it, when he was working in the mill, and in plain sight of it every hour of the day. It was not therefore a matter of common knowledge, but required experience in the use and knowledge of such machinery. It seems to me that it must have been admitted in the court below and sustained here upon the theory that it was a matter of expert knowledge and observation. An examination of the record of the case confirms me in this opinion. One of the witnesses permitted to answer these questions was a head sawyer of seven years' experience with such machinery, and the two others were, one a sawyer, and the other a mill carpenter, working in this identical mill, and having more than ordinary knowledge of the machinery and its use. The brief of the appellee filed in the case in this court justifies the reception of this testimony on the ground that it was expert evidence. As expert testimony it was admissible. But I do not think that persons not experts would have been permitted to answer these questions, nor in the case of this machinery could an ordinary jury, not familiar with mills and mill machinery, gather from a mere description of it the knowledge necessary to determine its character as to being dangerous in the condition it was. This is not however the case with snow or ice piled along a railway track, constantly open to the observation of everybody.

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"If this kind of evidence be declared competent, we shall have no doubt as many witnesses upon a side as the court below will permit, swearing, one set that the crossing was dangerous, and the other that it was perfectly safe. How this can help the jury passes my comprehension, and if any witness commits perjury, as before said, it cannot be detected or punished, nor is there any criterion within this kind of testimony itself to determine the reliability or worth of this or that man's belief about the safety of the crossing. It opens the door to opportunities for fraud, and to uncertainties in legal investigation, which I for one cannot thus encourage.

"If upon the next trial of this case a witness for the plaintiff should swear that the ridges of snow were five or ten feet high, or a witness for the defendant should testify that there was no snow at all along the track, such testimony could easily be disproved by plenty of persons, and the falsity of the witness in either case satisfactorily established. But the false and fraudulent opinion of a witness cannot be thus reached. Other circumstances may show his belief a mistaken one, but his deliberate intention to swear falsely cannot be proven. Therefore such evidence is dangerous, and liable to defeat the end of justice.

"It is a general rule that witnesses must give evidence of facts, and not of opinions. The exceptions to the rule do not include, as I can find, such opinions as were offered and rejected in the court below. In Stephen's Digest of Law of Evidence, which notes the exceptions to the general rule, and cites a large number of cases illustrating the variety of such exceptions, there is no case reported where the dangerous character of such a place as this crossing has been permitted to be established by the opinions of eye-witnesses, nor is any case cited bearing any analogy to such ruling.

"In some of the New England States the question has arisen in the courts whether the opinions of eye-witnesses were competent as evidence of the safety of highways and bridges, or as to the dangerous character of certain places or defects in the road and streets. Such inquiries are analogous to, and should be governed by the same principles as the inquiry into the character of the crossing in this case. I have been able to find but one case where the opinion of the witness was allowed to be given in evidence, and in that case it was permitted upon the express finding that the answers were statements of fact, and not opinions. In an action against a town for injuries received in consequence of a defect in a highway, witnesses were asked the condition of the road, and answered: 'There was a bad place at the side of the road.' 'The condition of it was bad.' 'At the mouth of the culvert it was a steep — right down; a culvert that I thought a dangerous place.' Upon the claim that these answers were improperly admitted because they merely expressed the opinion of the witnesses, who were not experts, and were not statements of any fact, the court said: 'But the court do not so understand the testimony. The witnesses are not asked their opinion as to the sufficiency or insufficiency of the road, but the inquiry was as to the actual condition of the road in point of fact, and as to what the witnesses knew, not what was their opinion on the subject. The answers of the witnesses described the actual condition of the road as within their personal knowledge, and are not expressions of opinion.' *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 86.

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"In the case of *Crane v. Town of Northfield*, 83 Vt. 124, the question was as to the sufficiency of a bridge or culvert while covered with dirt. A witness, who was present at the time of the accident, was not allowed to make the statement that if the dirt had not been washed from the bridge the injury would not have happened. It was claimed that as he was present when the accident happened, and examined the bridge, he was entitled to give his opinion. But the court, after citing the general rule, and giving the exceptions and the reason therefor, says: 'The substance of the witness' opinion that was asked for was whether it (the bridge) was then safe and sufficient. This was the very question that the jury was to try and decide, and it does not appear to us that there could be any difficulty in having the condition of the culvert so described to the jury by the witness that they would be just as capable of exercising their judgments, and forming a correct opinion, as the witness himself.'

"The following cases hold the same doctrine: *Lester v. Pittsford*, 7 Vt. 158; *Patterson v. Colebrook*, 29 N. H. 94; *Hutchinson v. Inhabitants of Methuen*, 1 Allen, 83.

"I believe it is better and safer to hold in accordance with the authorities last cited. The rule that the facts must be shown, and not the opinions of the witnesses, should be adhered to in all cases where the nature of the thing to be described is such that opinions are not absolutely necessary to correctly inform the jury of the fact in issue in relation to such thing or object. This is a case where there can be no great difficulty in that respect. What is a hindrance, rather than an aid to the jury should be excluded, especially when it is but the conclusions of witnesses upon facts from which no one but the jurors have any right to draw inferences."

In *Ryerson v. Abington*, 103 Mass. 581, GRAY, C. J., said that such testimony "would have been incompetent if objected to," and could not have been contradicted if elicited on cross-examination. The testimony was of a highway surveyor that he considered the place in question safe.

In *Stillwater Turnpike Company v. Coover*, 26 Ohio St. 520, such evidence was held inadmissible. "Whether that place in the road was dangerous was a question for the jury, and not for the witnesses. It was not a question of science or art, nor was it one where the jury could not have been put in possession of all the facts necessary to its decision."

In *Ferguson v. Hubbell*, 97 N. Y. 507; s. c., 49 Am. Rep. 544, it was held that opinions as to the proper time for turning a fallow are incompetent. See note to same case p. 554.

In *Hoover v. Barkhoof*, 44 N. Y. 118, an action against highway commissioners for injuries by the falling of a bridge, one of the defendants was asked as a witness, "if he believed the defendant had made use of all the means necessary to the safety of the bridge," and the exclusion of this was sustained.

In *Couch v. Rail. Co.*, 23 S. C. 557, opinions of witnesses that an open water-way across a railroad track was dangerous, was held inadmissible.

In *Larson v. Chicago, etc., Ry. Co.*, 67 Wis. 447, opinions as to whether a stock car was dangerous for a person to ride in, held, inadmissible.

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Opinions as to the prudence of trying to drive over a defective way are incompetent. *Town of Albion v. Hetrick*, 90 Ind. 545; s. c., 46 Am. Rep. 230.

Judge Thompson (Neg. 799), gives his opinion against the competency of such evidence, and so does Mr. Lawson (Exp. Ev. 95, 508). Mr. Rogers (Exp. Ev.) does not commit himself.

The weight of authority is clearly opposed to the doctrine of the principal case.

SUSQUEHANNA FERTILIZER COMPANY v. WHITE.

(66 Md. 444.)

Evidence — usage — “settlement.”

Evidence of a local usage to attach “a peculiar meaning” to the word “settlement” in a mercantile contract is inadmissible.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

Arthur W. Machen and *Graham Gordon*, for appellant.

Henry C. Kennard, for appellee.

YELLOTT, J. The appellant, who was a plaintiff below, was a body corporate, having been duly incorporated under the laws of Maryland; and the defendant below was doing business under the name of Thomas H. White & Company. The plaintiff was engaged in the manufacture and sale of fertilizers, and one Passmore was its manager and treasurer. On the 13th of June, 1885, Thomas H. White stated to Passmore that he had in his possession a promissory note drawn by the Rialto Guano Company, payable to their own order, and indorsed by Lippman Seldner. He informed Passmore that this note was the property of a western party, a customer of his firm, who had instructed him to purchase acid phosphate to the amount of said note. He said that the standing of the Rialto Guano Company was good and that the note was “all right.” On the 15th of June, 1885, the transaction was closed by the delivery of the phosphate to the defendant from whom the plaintiff received the said promissory note, which was not however indorsed by Thomas H. White & Company.

* See *Morningstar v. Cunningham*, post.

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As evidence in the record is what is termed a sale note, which is a memorandum or account of the sale and delivery of one hundred and sixty tons of phosphate, and appended thereto is a receipt signed by Thomas H. White & Co., and containing the following words:

“Terms: Settlement herewith by note of the Rialto Guano Co. due Sept. 23d, 26th, '85, payable to their own order and indorsed by L. Seldner.”

The promissory note of the Rialto Guano Co., presented for payment at maturity, and not being paid, was protested; and subsequently an action of assumpsit was brought against Thomas H. White & Co. for the price of the goods thus sold and delivered. The verdict and judgment being for the defendant, the plaintiff has brought the questions involved in controversy into this court by an appeal.

The appellee contends that the promissory note was taken by the plaintiff as absolute payment for the fertilizers, and that the transaction was simply an exchange of the goods for the note. There is a mass of conflicting testimony, the plaintiff endeavoring to prove that the note was not received as payment, unless it was paid at maturity, and the defendant seeking to show that the transaction was fully consummated by the transfer of the note, or in other words, that there was simply an exchange of paper for goods without further liability on the part of said defendant. The questions for determination on this appeal are presented by the exceptions taken by the plaintiff to the refusal of the court below to permit the introduction of testimony tending to prove that by a certain usage among the merchants of Baltimore, a peculiar meaning is attached to the word “settlement,” and to the rejection of its first and third prayers, and to the granting of the defendant’s first and fifth prayers. It is conceded that the note of the Rialto Guano Co. was not indorsed by defendant, and has never been paid; both its maker and indorser having become insolvent before its maturity.

The plaintiff offered to prove by a witness that the word “settlement,” as used in contracts for the sale of merchandise, has a recognized meaning in commercial usage in the city of Baltimore. He also offered to prove what such meaning is. The court refused to admit the proof as offered; and its refusal forms the foundation for the appellant’s first bill of exception.

It cannot be controverted that the principle has been established by adjudication that, “in commercial instruments and written con-

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tracts, the usage of a particular trade, profession or place" may be proved for the purpose of ascertaining the meaning of certain words, signification of which may be doubtful. It is not to be denied that if a word has acquired a peculiar meaning in a certain trade or business, either local or general, that meaning will be applied to it in the construction of written instruments affecting the transactions growing out of that trade or business; but the fact that the word has acquired such meaning must be distinctly proved by the adduction of satisfactory evidence. *Allegre's Adm'rs v. Md. Ins. Co.*, 2 G. & J. 137; s. c., 20 Am. Dec. 424; *Taylor v. Briggs*, 2 Carr. & P. 525; *Murray v. Hatch*, 6 Mass. 465; *Coit v. Commercial Ins. Co.*, 7 Johns. 385; s. c., 5 Am. Dec. 282.

And it is apparent that the tendency of the American decisions is to restrict, rather than to extend, the application of the principle first established by the sanction of judicial authority in England, and subsequently recognized and adopted in this country. In *Allen v. Dykers*, 3 Hill, 597, NELSON, C. J., in delivering the opinion of the court said: "We are especially bound to refuse effect to any general or particular usage, when in direct contradiction to the fair and legal import of a written contract."

And in *Bolton v. Colder*, 1 Watts, 360, Chief Justice GIBSON of the Supreme Court of Pennsylvania, said: "Nothing should be more pertinaciously resisted, than these attempts to transfer the functions of the judge to the witness' stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules, whose existence perhaps they had no reason to suspect before they came to be applied to their rights. If the existence of a law be so obscure as to be known to the constitutional expounders of it, only through the evidence of witnesses, it is no extravagant assumption, to take for granted that the party to be affected was ignorant at the time when the knowledge of it would have been most material to him."

Many of the highest courts in this country have decided that when the meaning of words is not ambiguous, proof of usage will not be received in the interpretation of contract. *Macomber v. Parker*, 13 Pick. 175; *The Schooner Reeside*, 2 Sum. 568; *McArthur v. Sears*, 21 Wend. 190; *Gage v. Myers*, Mich.

The citation of these cases has been introduced for the purpose of showing the tendency of American decisions in the direction already indicated.

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In *Foley v. Mason*, 6 Md. 50, it is said "that usages in general have fallen in later years, much into disfavor with the courts, as they have been disliked and discountenanced in all times by the ablest of judges." In that case it was proposed to show that there existed among the merchants of Baltimore a usage to deliver merchandise sold for cash without receiving the cash at the time of delivery, but this court determined that evidence of such usage was inadmissible. It has been repeatedly decided that a usage must not be in restraint of trade; that it must not conflict with public policy and the law of the land, and that it must be reasonable and not productive of injustice in its practical operation. *Mitchell v. Reynolds*, 1 P. Wms. 181; *Bowen v. Stoddard*, 10 Metc. 381; *Metcalf v. Weld*, 14 Gray, 210.

In the court below the plaintiff offered to prove the existence of a usage. There was an objection to this offer and the duty then devolved on the party making the offer, to distinctly state what was the usage. This duty was not performed, and it was simply an offer to prove that among the merchants in Baltimore some peculiar meaning was attached to the word "settlement." It was not stated what that peculiar meaning was. The court below was therefore without information in relation to the meaning intended to be proved as existing by usage; and a court must know what a usage is before it can safely admit evidence of its existence, for if admitted without this information it might subsequently be discovered that it ought to have been excluded, the usage being in conflict with public policy, with the established law of the land, or unreasonable and unjust in its operation. The court below was therefore right in rejecting the evidence as offered; but it must not be understood that we decide on this appeal that proof of usage is never admissible for the purpose of explaining the meaning of terms used in formation of a contract. What we do decide is that such evidence should be admitted with extreme caution, and never until the party offering it has distinctly stated to the court what he intends to prove.

[Omitting minor points.]

There being no error in any of the rulings in the court below its judgment should be affirmed.

Judgment affirmed.

SELDNER V. MOUNT JACKSON NATIONAL BANK.

(86 Md. 488.)

Negotiable instrument — partnership — dissolution — waiver of protest.

One partner after dissolution may waive notice of demand and non-payment of a note indorsed by the firm and discounted for it.

A telegram directing the holder to "pay note and save protest," and to "draw on" the partner, is a valid waiver.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Samuel Snowden, for appellant.

Fielder C. Slighuff, for appellee.

ROBINSON, J. The appellee is the holder of a promissory note for \$3,500, dated March 5, 1885, drawn by G. S. P. Triplett, and payable four months after date to the order of L. Seldner & Son. The note was indorsed by L. Seldner & Son and discounted for them by the Merchants' Bank of Baltimore, and was sent to appellee bank for collection. A few days before its maturity, the appellee wrote to the chief clerk of the firm of L. Seldner & Son in regard to the payment of the note, and on the 8th of July, 1885, the day of its maturity, received the following telegram:

"If G. S. P. Triplett will meet his note due to-day, he can draw on me for the amount.

L. SELDNER."

On the afternoon of the same day the appellee received another telegram, as follows:

"Have learned that Triplett is away from home. If he has not left draft with you, you will please pay note and save protest, you can draw on me. Answer.

L. SELDNER."

As requested by this telegram, the appellee paid the note for and on account of L. Seldner & Son, and on the same day drew a draft on them, which was returned "unpaid." Afterward, at his request, the appellee drew a draft on L. Seldner which was also returned "unpaid."

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This suit is brought by the appellee against Eva Seldner and Lippman Seldner, her son, partners trading as L. Seldner & Son, to recover the amount due on said note. At the time the note was drawn and indorsed, and discounted by the Merchants' Bank, the appellants, Eva Seldner and Lippman Seldner were, and for several years prior thereto, had been partners trading as L. Seldner & Son. The partnership however was dissolved by mutual consent in April, 1885, and notice of the dissolution was published some time in the month of July following, the precise date of the same, whether before or after the 8th of July, the day of the maturity of the note, does not appear. In our view of the case this is immaterial.

Now a great deal was said about the power of one partner to bind his copartner after the dissolution of the partnership, and the case was argued on the part of the appellant as if the suit was brought upon a new contract made between Lippman Seldner, the settling partner, and the appellee after the dissolution of the partnership. This however is not the case. The suit is brought on a note indorsed by and discounted for the firm, and upon which all the partners were liable. The appellee was bound, of course, to give notice of demand and non-payment by Triplett, the maker; and the only questions are (1), Whether Lippman Seldner, one of the partners, had the right after dissolution of the partnership to waive notice of demand and non-payment? and (2), Whether the telegrams of July 8, are to be construed as a waiver?

That he had the right to waive demand and notice so long as the partnership continued is clear; and we see no good reason why the mere dissolution of the partnership, should operate as a revocation of his authority. It operated, no doubt, as a revocation of all authority on his part to bind his former partners by new contracts, but it did not revoke his authority to adjust, liquidate and settle the partnership affairs. The note was in the hands of the appellee for collection, and all the holder was required to do, in order to bind Seldner & Son, the indorsers, was to make demand on the maker, and in default of payment to give notice to the firm or to one of the members of the firm. And if Lippman Seldner, the settling partner, knew the maker was unable or did not mean to pay the note, and that demand upon him would therefore be useless, he certainly had the power to waive demand and protest, and thereby save the note from dishonor. In so doing, he does not make a new contract, nor does he incur a new liability, but merely

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dispenses with a requirement of the law intended solely for the benefit and protection of the indorser. The precise question before us was fully considered in *Darling v. March*, 23 Me. 184,* and it was decided in that case that a partner had the right after the dissolution of the partnership, and after notice of the dissolution, to waive demand and notice.

"The waiver of demand and notice," says the court, "is but the modification of an existing liability by dispensing with certain testimony, which would otherwise be required. If one of the former partners could not dispense with proofs which might be required at the time of the dissolution, he could not liquidate the accounts, and agree upon balances. To waive demand and notice, and to settle accounts is but to arrange the terms upon which an existing liability shall become perfect, without further proof. In doing this, he does not make a new contract, but acts within the scope of a continuing authority."

There is a broad distinction between a waiver under such circumstances, and a promise by a partner, made after the dissolution, to pay a debt barred by the statute of limitations. The mere waiver of demand and notice does not, as we have said, create a new liability; whereas to permit a partner to renew a debt barred by the statute as against his copartners, by an acknowledgment or a promise to pay made after the dissolution, would be to allow him to create a new liability.

The only question then is, whether the telegram of July 8th, is to be construed as a waiver of demand and notice? And here we may say, it is not necessary that the waiver should be expressed *in totidem verbis*—it matters not what particular language is used, provided it plainly appears that the indorser meant to dispense with the demand and notice. *Fuller v. McDonald*, 8 Greenl. 213; s. c., 23 Am. Dec. 499; *Woodman v. Thurston*, 8 Oush. 157; *Emery v. Hobson*, 62 Me. 578.

It has been held in many cases that any language calculated to induce the holder not to make demand or protest is sufficient. *Moyer & Brothers' Appeal*, 87 Penn. 129; *Boyd v. Bank of Toledo*, 32 Ohio St. 526. In *Sigerdon v. Matthews*, 20 How. 496, where the party told the holder not to protest the note, as it should be paid at maturity, this was held to be a waiver of demand and notice. So in *Whitney v. Abbott*, 5 N. H. 378, where the indorser

* Followed in *Star Wagon Co. v. Swezey*, 52 Iowa, 391.

Seldner v. Mount Jackson National Bank.

being informed that the maker had failed, told the holder there would be no trouble about it, and that he would pay it. And again in *Barker v. Parker*, 6 Pick. 80, where in response to inquiry by the holder, the indorser told him that it would be of no use to call upon the maker, it was held that demand and notice were waived. Other cases could be cited to the same effect.

Now, in this case, Lippman Seldner on the day of the maturity of the note, telegraphs that he has learned that Triplett, the maker, is away from home, and requests appellee to pay the note and save protest, and draw on him. The intention to waive demand and notice could not have been expressed in language more explicit, unless he had said in so many words that he waived, etc., and this was unnecessary.

Some stress was laid upon the fact, that the telegram was signed by Lippman Seldner, and not in the name of L. Seldner & Son. But it was sent in reply to an inquiry made by the appellee of L. Seldner & Son, as to the payment of the note, indorsed by the firm of which Lippman Seldner was a partner. And if he had the right as partner to waive demand and notice, it was altogether immaterial whether it was signed by him or in the name of the firm.

It follows from what we have said that the appellant was in no manner prejudiced by the rulings below, and the judgment will therefore be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

CONTINENTAL INSURANCE COMPANY V. JACHNICHEN.

(110 Ind. 52.)

Evidence — measure of proof of criminal act in civil action.

In an action on a policy of fire insurance, the defense that the insured purposely burned the property need not be established beyond a reasonable doubt; a preponderance of evidence is sufficient.

ACTION on a fire insurance policy. The head-note states the point. The plaintiff had judgment below.

J. O. Cravens, A. Stockinger and J. W. Gordon, for appellant.

J. G. Berkshire and J. L. Benham, for appellee.

MITCHELL, J. Jachnichen sued the Continental Insurance Company upon a policy of insurance, to recover the value of a barn and its contents, which the complaint alleged were covered by the policy, and which were alleged to have been destroyed by a fire, of unknown origin, in September, 1884.

Among other defenses, the company answered that the assured had himself purposely burned the property with the intent to defraud the insurance company.

The plaintiff below recovered. The only question presented by the record, which in view of the defective condition of the bill of exceptions purporting to contain the evidence can be examined on

this appeal, involves the propriety of an instruction given by the court at the trial.

In its fifth charge the court told the jury, that in order to maintain the defense, that the plaintiff had himself purposely destroyed the property for which he was seeking to recover, with the intent to defraud the company, the latter must establish the truth of such defense beyond a reasonable doubt.

In support of the charge thus given, it is contended in effect that the defense relied on imputes to the plaintiff the crime of arson; that when a crime is thus specifically charged, whether it be in a civil or criminal action, the rule is applicable, that before the issue can be found against the party thus charged, the evidence must be of such weight and certainty as to exclude all reasonable doubt of the truth of the charge made.

The question presented has been the subject of much discussion in the reported cases, as well as by writers upon the law of evidence.

The statute regulating civil procedure requires that where there is a reasonable doubt of the defendant's guilt, he must be acquitted. The rule which demands greater certainty and weight of proof in criminal than is required in civil cases, has its foundation in the tender regard in which the law holds the life and liberty of the subject.

It had its origin, and was moulded into form and consistency, when the penal code of England visited upon offenses of a comparatively trivial character the most harsh and cruel punishments. To mitigate the rigor of a code sometimes administered with severity, human judges engrafted upon the common law the rule that no one should be convicted of a crime which affected life or liberty, until his guilt was established with such a degree of certainty as to exclude every reasonable doubt. Having grown up out of the humanity of the law, the rule is very properly retained in criminal cases, even after the reasons for it have in a great measure ceased to exist. Indeed there is little of any rule whose origin, however remote, is found in the source whence this rule came, which should either be dissipated or obscured in the administration of the law. The consequences of a mistake, when life and liberty are involved, are so overwhelming and irreparable that the integrity of the rule which requires a greater degree of certainty and caution in such a case, before coming to a conclusion, than in a case which affects

property merely, should be steadily maintained and intelligently applied. This can only be done by limiting it to the class of cases which called it into being. To extend it is to render it obscure, and dissipate its benign effect, in the cases where its benefits should be fully realized.

In some exceptional cases, the doctrine that where a criminal act is charged in a civil action, the crime imputed must be established beyond a reasonable doubt, has gained recognition, notably in cases of libel and slander, when the defendant undertook to justify the uttering or publishing of that which amounted to a felony, and in cases where the action involved the burning of property under circumstances which amounted to arson. The rule was first extended to cases of libel and slander in England. The reason for the extension of the rule there was, that if upon the trial of a plea of justification of a charge which imputed a felony, the defendant proved the plea, the plaintiff was subject to be put upon trial for the felony proved, without the intervention of a grand jury. The verdict in such a case was equivalent to an indictment of the plaintiff. *Cook v. Field*, 3 Esp. 133; 2 Hale, *150; 1 Chitty Crim. Law, 164; *Polston v. See*, 54 Mo. 291, 298; *Ellis v. Buzzell*, 60 Me. 209; s. c., 11 Am. Rep. 204.

No such reason ever existed in this country for the application of the rule, and it may therefore be said, it has been applied without any adequate reason. It may well be doubted whether its application can be supported upon principle, notwithstanding the precedents in its favor.

In the case last cited, speaking of the rule as applicable to a case of slander, the Supreme Court of Maine says: "But we think it time to limit the application of a rule which was originally adopted *in favorem vitæ* in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages."

Leaving the subject so far as it relates to cases of slander and libel for further examination, when such a case arises, it is only proper to add here, that the current of modern authority tends strongly in the direction indicated by the Supreme Court of Maine, in *Ellis v. Buzzell*, *supra*; 10 Am. L. Rev. 942.

In respect to other civil actions, in which the commission of a crime is in issue, CAMPBELL, J., disposed of the whole subject in the following *teræ* declaration: "There is no rule of evidence

which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved. * * * There is no rule of law which adopts any sliding scale of belief in civil controversies." *Elliott v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668. So in the case of *Gordon v. Parmelee*, 15 Gray, 413, DEWEY, J., said: "It is better that the rule be uniform in all civil cases, leaving the instruction 'that the jury must be satisfied of the guilt of the party beyond a reasonable doubt' to apply solely to criminal cases."

As a matter of course, when an infamous charge is preferred, whether it be in a civil or criminal case, the same presumptions of innocence attach in favor of the party assailed, and doubtless the jury should scrutinize the evidence with greater caution before coming to a conclusion in favor of guilt; but as is said by a learned author: "In civil issues the result should follow the preponderance of evidence, even though the result imputes crime." Whart. Ev., § 1246.

The rule that a preponderance of the evidence is all that is necessary to maintain the affirmative of the issue in a civil case, is not vitiated by directing the attention of the jury to the nature of the issue, and to the presumption of innocence where a crime is charged, nor by reminding them that more evidence is required to create a preponderance and establish guilt over such presumption, than is required where no such presumption obtains. To create a preponderance, the evidence must overcome the opposing presumptions, as well as the opposing evidence. *Decker v. Somerset M. F. Ins. Co.*, 66 Me. 406; *Lyon v. Fleahman*, 34 Ohio St. 151.

In proportion as the crime imputed is heinous and unnatural, the presumption of innocence grows stronger and more abiding, and until such presumption and all countervailing evidence are overborne with satisfactory evidence of guilt, it cannot be said there is a preponderance against the party accused. But the preponderance may outweigh the presumption of innocence, and all the evidence sustaining the presumption.

Some of the text-writers, and several of the earlier reported cases, approve the doctrine, that where a criminal act is charged, even in a civil action, other than slander or libel, the charge must be established beyond a reasonable doubt, before a recovery can be had, by the party making the charge. 2 Greenl. Ev., § 408; Taylor Ev., § 97a; 2 Bish. Mar. & Div., § 644; *Thurtell v. Beaumont*, 1 Bing. 339; *Barton v. Thompson*, 46 Iowa, 30; s. c., 26 Am. Rep. 131;

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Lexington Ins. Co. v. Paver, 16 Ohio, 324; *McConnel v. Delaware M. S. Ins. Co.*, 18 Ill. 228; *Thayer v. Boyle*, 30 Me. 475; *Kane v. Hibernia Ins. Co.*, 38 N. J. 441; s. c., 20 Am. Rep. 409.

The more recent authorities are however decidedly adverse to this view.

In the case of *Barton v. Thompson*, *supra*, the rule applied by the learned judge below was distinctly sanctioned by the Supreme Court of Iowa. The same learned court, constrained by the weight of authority, expressly overruled *Barton v. Thompson*, *supra*, in the more recent case of *Welch v. Jugenheimer*, 56 Iowa, 11; s. c., 41 Am. Rep. 77. So also the Supreme Court of New Jersey, in *Kane v. Hibernia Ins. Co.*, *supra*, following the authority of Greenleaf and the libel and slander cases, adopted the rule contended for by the appellee. Upon an exhaustive review of the same subject, the Court of Appeals in New Jersey overruled the former decision, in *Kane v. Hibernia Ins. Co.*, 39 N. J. 697; s. c., 23 Am. Rep. 239. In this last case, some of the judges undertook to maintain a distinction between cases such as this, and cases of libel and slander; while others refused their assent to the attempted distinction, apparently by favoring the abrogation of the rule in all civil cases. Indeed so far as we have observed, all the courts, which in some of the earlier cases applied the rule under consideration to civil actions, have more latterly receded from their former holdings in that regard. *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 752; *Lyon v. Fleahman*, *supra*; *Blaesser v. Milwaukee, etc., Ins. Co.*, 37 Wis. 31; s. c., 19 Am. Rep. 747; *Marshall v. Thames Ins. Co.*, 43 Mo. 586; *Rothschild v. Am. Cent. Ins. Co.*, 62 Mo. 356; *Schmidt v. New York, etc., Ins. Co.*, 1 Gray, 529; *Bissell v. Wert*, 35 Ind. 54; *Scott v. Home Ins. Co.*, 1 Dill. 105; Cooley Torts, 208; May Ins., § 583.

It may therefore be considered as established, that in civil actions of this class the rights of the parties are to be determined by a preponderance of the evidence. Being a civil action, it is subject to all the rules which belong to actions of that class, without regard to the fact, that the matter in issue may involve the imputation of a crime. This applies as well to the admissibility of evidence in respect to the character of the parties, as to all the other distinctions between civil and criminal actions. *Welch v. Jugenheimer*, *supra*; *Barton v. Thompson*, *supra*; 41 Am. Rep. 119; *Gebhart v. Burkett*, 57 Ind. 378; s. c., 26 Am. Rep. 61, and cases cited.

Judgment reversed, with costs.

Judgment reversed.

Cheadle v. State.

OHEADLE V. STATE.

(110 Ind. 301.)

Contempt — newspaper comment on past case.

Libellous newspaper comments on judicial proceedings in concluded cases may not be treated as contempts.

PROCEEDING for contempt. The opinion states the case.
The defendant appealed.

J. G. Adams, W. R. Stokes and H. C. Sheridan, for appellant.

W. A. Staley, for State.

NIBLACK, J. On the 14th day of December, 1885, the prosecuting attorney of the Forty-fifth Judicial Circuit filed in the Clinton Circuit Court an information, supported by his oath, charging that Joseph B. Cheadle was the editor of and proprietor of a newspaper of general circulation, known as the "Frankfort Banner," printed and published in the county of Clinton, in this State, and that there was then pending, and undisposed of, in said court, a cause entitled "The State of Indiana against James A. Spurlock," in which the defendant Spurlock was charged with an assault and battery with intent to commit murder; that the said Spurlock was then confined in the jail of said county, upon the charge so pending against him; that the said Cheadle did, on the 12th day of December, 1885, print and publish in his said newspaper at the city of Frankfort, in which said court was then in session, a certain false, scurrilous and malicious article concerning said cause and the court in which and judge before whom the same was pending, as follows:

"A JOKE ON A JUDGE."

"One of the cases that has taken up the attention of the court this week is that of the *State v. James A. Spurlock*, for an assault with intent to kill. The case was called, a jury impanelled, and the prisoner was arraigned, pleaded not guilty, and the State had nearly concluded its evidence, when the court adjourned, Wednesday night. Mr. Spurlock said he must go home; his attorneys urged and insisted that he must remain. Finally he told them that it was absolutely necessary for him to go — that he had no money

with which to pay his hotel fare, and he must go, but that he would be back by 8 o'clock in the morning, and he went. He went and overslept himself and did not get back in time. The case was called at the usual time for opening court and the trial proceeded. After a while the judge noticed that the defendant was not present and asked where he was. The attorneys informed the court of the facts, and asked that the case proceed, notifying the court that they would waive all questions that might arise until he came in, but the court said, 'No, we will wait awhile,' and it did. Spurlock had overslept himself and did not get an early start, and the road was rough, and he had to walk, made slow progress, but all the time he was coming with the perspiration streaming from every pore, yet the court could not know these facts and become restive. Senator Kent, who had faith in Spurlock's return, begged for time. Bristow, majestic in size and strong in confidence of his client, said: 'Your honor, there is a good cause for his absence; he will surely come.' D. J. McMath, quiet and firm, urged delay and said he knew Spurlock would not desert him. The judge lost his temper — lost it bad — and intimated that the attorneys had spirited him away. Kent arose wrathful, yet calm, and in dignified manner informed his honor that his client had gone home against his advice and over his protest, and that his honor had no right to expect him as attorney to handcuff and imprison his clients in order to keep them in court. Then came a talk about the bond, and the judge declared it was of no value, and in the meantime poor Spurlock was walking for life to reach the court-house — more words between the counsel and the judge — more intimations that they were responsible, and all the time the judge became more nervous. Finally the attorneys concluded that Spurlock might have gone, and all the time Spurlock, like Sheridan, less than three miles away walking for life.

"The judge read the attorneys a lecture; they apologized. The State attorney assured the court that he had the fullest confidence in the statements of the attorneys for the prisoner on trial, and yet the court could not see poor Spurlock in his famous walk less than two and a half miles away. Having been accused wrongfully, the attorneys for the prisoner decided to withdraw from the case, and did so. At this point the court called the jury, thanked them for their courtesy, and discharged them, and ordered the sheriff to call the defendant and his bondsmen on the recognized bond, and

as the sheriff shouted 'Bring in the body of James A. Spurlock and save your recognizance,' away over the hills to the east, and stepping just three feet and two inches to the step, with every muscle strained to the highest tension and walking for life, came James A. Spurlock only two miles away, in his now famous walk to the court-house, December 10, 1885.

"Having discharged the jury, forfeited the bond, the judge had a bench warrant issued, and instructed the sheriff to go quickly and be prepared for business, and to bring into his presence the body of James A. Spurlock, not to spare expense, and that the court would foot the bill; and then there was 'hurrying to and fro,' deputies 'to the right of him,' deputies 'in front of him,' deputies 'behind him,' deputies 'to the left of him.' How grandly marched these deputies into the vortex of danger; all of them into the county's purse, rode they, while just beyond the city limits, with rapid pace and earnest face, all unconscious of the affray, marched in broad daylight, down a public road — Spurlock, the hunted. No one can tell just what mysterious path the deputies pursued, nor what momentous questions puzzled the brains of attorneys and judge, while through the open gates of the city, came all covered with dust, and with bated breath — Spurlock, the hunted. He paused not at the iron bridge, the public square he crossed, and into the court-house he went; through its great broad corridors he strode, up the stairway and into the court-room, unmindful of the fact that everywhere there were hurrying steps and mounted deputies armed to the teeth, scouring the country far and near, for — Spurlock, the hunted. He quietly sought his chair near the place where the jury, solemn and quiet, sat but yesterday. He looked in vain for jury and judge, for attorneys and friends, but alas! there were none; and so sat Spurlock for quite awhile, wondering what could have sent them away. After a time he sought and found his attorneys, and a scene ensued. Finally a deputy approached him meekly, and asked him if he was ready. Ready for what? said Spurlock. Ready to go to jail. The ignorant fellow said he did not know what he was to go to jail for — neither does any one else; but they marched him there. His attorneys prepared the papers to take him out on a writ of *habeas corpus*, and when they went to the jail to have him swear to them he still did not know that he was arrested. The judge granted the writ, and set the trial down for next Monday.

"The 'Banner' will ask, why is this man kept in jail until next Monday? There is no more authority for putting this man in jail than there is the president. He was on trial in jeopardy. He went home because he had no other place to go, nor money to buy a place to stay. He overslept himself, and did not reach the courthouse in time. His attorneys pleaded to let the trial go on. The court no doubt thought it a ruse, and finally discharged the jury. When he did that, at that moment Spurlock stood acquitted; the bond became inoperative, and the forfeiture of the recognizance was absolutely void, and his incarceration in jail illegal. It is simply an outrage to keep him there. No matter how guilty he may have been, he stands free, and it is no fault of his — no fault of his attorneys. He was not trying to get away, but walked nearly fifteen miles, hurriedly, to get back to his trial. The 'Banner,' on behalf of all the people, denounces his incarceration in jail, and begs the court to obey the law, and set him free. The people have just as much right to put the judge in jail as he had to order Spurlock sent to jail. This is the law, and the law should be obeyed."

The information further charged that the publication of said article interrupted and embarrassed the proceedings in the cause to which it related, and the administration of justice in said court, imputing, as it did, to the court, and to the judge thereof, wrongful, dishonest and corrupt conduct in causing the imprisonment of Spurlock as stated; also that said article contained many falsehoods and gross inaccuracies; that what was said in relation to the conduct of the sheriff and his deputies in re-arresting Spurlock was false, as was also the statement that the sheriff made no effort to re-arrest Spurlock until he came into the court-room; that the statements that the judge intimated that the attorneys for Spurlock had spirited him away, that the judge declared that Spurlock's bond was of no value, that the judge read the attorneys a lecture and they apologized, that Spurlock's attorneys begged that the trial might go on, and that the judge lost his temper badly, were all also false; that said article contained many other false and defamatory statements which tended to defeat the punishment of criminals, to degrade the court, and to bring the enforcement of the law in disrepute. Wherefore it was further charged that Cheadle had been guilty of a willful contempt of the authority of the court.

A rule was thereupon granted against Cheadle to show cause why he should not be attached and punished for the supposed con-

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tempt so committed by him. Cheadle, appearing, moved to discharge the rule, for the alleged insufficiency of the facts upon which it had been entered, but his motion was overruled. No final action upon the rule having in the meantime been taken against him, Cheadle, on the 16th and 19th days of said month of December, 1885, respectively, published additional articles in his newspaper, as follows:

"James A. Spurlock was still in jail this morning. The most sacred writ known to the law is that of *habeas corpus*. It is always made returnable at once. James A. Spurlock is a poor man, and cannot move the powers to be to act. The 'Banner,' as the advocate of the people, declares against the great wrong of keeping him in jail. The time will come, and in the near future, when it will be seen and known that the only true security is in the quick and fearless execution of the laws."

Also the following: "The writ known as that of *habeas corpus* is the most sacred writ known to the law. Persons, who are conversant with history, have read about the 'Star Chamber proceedings,' where men and women were imprisoned and never given a trial—never knew why they were imprisoned. Then there came contests, and blood flowed in great waves, and 'Magna Charta' came as the great boon of the people. Personal liberty is priceless. Great wars have grown out of the withholding the personal liberty of a single individual. The writ of *habeas corpus*, by which personal liberty is secured, when one is unlawfully or unjustly imprisoned, has always been made returnable immediately, and has always had precedence over all other forms of cases. There are no exceptions to this rule, and because this is true, and because it is of vital importance to the peace, prosperity and happiness of the people that personal liberty be held above all price, the 'Banner' has referred to it. So long as the present editor has charge of it, it can always be depended upon as a fearless advocate of the right, as its editor is given to see the right, and it will, at all times, demand the enforcement of the laws."

On the twenty-second day of the same month, the prosecuting attorney filed under oath what was termed a supplemental information, charging that these last named articles reflected upon the integrity of the court, and were, as well for that as for other reasons assigned, in further contempt of the authority of the court. Upon the filing of this supplemental information, another rule was

granted against Cheadle to show cause why he should not be also attached and punished for the publication of the articles lastly above set out, and a subsequent motion to discharge that rule was also overruled.

Cheadle then answered that the publications referred to were made by him upon what he regarded as reliable information, and in the belief that the prosecution against Spurlock had, in legal effect, terminated by the discharge of the jury under the circumstances attending its discharge, and that hence the subsequent imprisonment of Spurlock upon the original charge against him was wholly without authority in law, and in the further belief that all the facts therein stated, which could be fairly understood as seriously asserted, were substantially true; that such publications, in addition to being items of news, were intended as, and only designed to be, fair criticisms upon what he considered an inadvertent error of the court, and what he still believed was an erroneous proceeding, disclaiming, at the same time, any intention of imputing corrupt motives to the court or any of its officers, or of interrupting or in any manner obstructing the administration of justice.

The court, not regarding the answer of Cheadle as sufficient to constitute a defense to the charge against him, adjudged him to have been guilty of an indirect contempt of its authority, assessing a fine of \$50 against him, and requiring him in addition to pay the costs of the proceedings so taken against him.

The statute defining the powers and duties of Circuit Courts provides that "The said Circuit Courts, respectively, shall have full authority to administer all necessary oaths, and to punish, by fine and imprisonment, or either, all contempts of their authority and process in any matter before them, or by which the proceedings of the courts or the due course of justice is interrupted." Rev. Stat. 1881, § 1322.

It is elsewhere enacted that "Every person who shall falsely make, utter, or publish any false or grossly inaccurate report of any case, trial, proceeding, or part of any case, trial, or proceeding thereof, shall be deemed guilty of an indirect contempt of the court in which such case, trial or proceeding may have been instituted, held, or determined, if made at any time after such proceeding shall have been commenced, and at any time while the same is pending, and while the court shall have jurisdiction thereof, and at any time before it shall be fully determined and ended; or if

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such report shall be so made pending such case, trial or proceeding, touching any ruling, or order of said court therein, such person shall be deemed guilty of an indirect contempt of the court making such ruling or order." Rev. Stat. 1881, § 1009.

This last statutory provision is in its nature cumulative only, and does not exclude other methods of committing indirect or constructive contempts of the authority of courts. It was held in the case of *Little v. State*, 90 Ind. 338; s. c., 46 Am. Rep. 224, that the power to protect itself from contempts, and also to determine what is a contempt, is inherent in every court of superior jurisdiction, and that it is not in the power of the legislature to prevent the one or to abridge the other. 2 Bish. Crim. Law, § 243. But the legislature may aid the jurisdiction or enlarge the power of the courts in those respects by declaring certain improper conduct to be a contempt which has not theretofore been so regarded and treated, and may regulate the practice in proceedings against persons for an alleged contempt. *State v. Morrill*, 16 Ark. 384; *Worland v. State*, 82 Ind. 49.

It may be said, generally, that any willful act tending to obstruct, interrupt, or embarrass the proceedings of a court, or to corrupt or impede the due administration of justice, is a contempt of the authority of the court against which such willful act is directed.

As regards indirect or constructive contempts, resulting from improper publications, Bishop, *supra*, in vol. 2, section 259, states the general doctrine to be, that any publication, whether by parties or strangers, relating to a cause in court, which tends to prejudice the public as to its merits, and to corrupt and embarrass the administration of justice, may be visited as a contempt, and this includes the reflections on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel. *Ex parte Wright*, 65 Ind. 504.

In the light of this general doctrine, which is well supported by authorities, section 1009 of the statutes above set out ought to be construed as meaning that every person who shall falsely make, utter or publish any false or grossly inaccurate report of any case, trial or proceeding, or part of any case, trial or proceeding thereof, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, shall be guilty of an indirect contempt, etc. The publication must therefore not only be false, or grossly inaccurate, but must be so to the extent of prejudic-

ing the public as to the merits of the cause referred to, and of either corrupting or embarrassing the proceedings then pending and thereafter to ensue.

The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceedings. *Rapalje Contempts*, § 56.

While the phraseology of the section of the statute in question is, possibly, in that respect, somewhat obscure, it contains nothing, as we construe it, changing that general rule. It follows therefore that comments, however stringent, which have relation to proceedings which are past and ended, are not in contempt of the authority of the court to which reference is made. Such comments may constitute a libel upon the judge, or some other officer of the court, but cannot be treated as in contempt of its authority. *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Stewart v. People*, 3 Scam. 395; *People v. Wilson*, 64 Ill. 195; s. c., 16 Am. Rep. 528; *Story v. People*, 79 Ill. 45; s. c., 22 Am. Rep. 158; *Bayard v. Passmore*, 3 Yates, 438; *In re Bronson*, 12 Johns. 460; *Respublica v. Oswald*, 1 Dall. 319.

At common law the courts possessed the power of punishing, as for a contempt, libellous publications upon their proceedings, whether pending or past, but in this country the courts are more circumscribed in their jurisdiction in that respect, and their power to punish is confined to publications concerning pending cases. *State v. Morrill*, *supra*.

As will appear by a reference to the information first filed, the alleged falsity of the publication therein set out consisted of statements: *First*. As to the manner in which the sheriff and his deputies re-arrested Spurlock. *Second*. That the sheriff made no effort to re-arrest Spurlock until he came into the court-room. *Third*. That the judge intimated that the attorneys for Spurlock had spirited him away. *Fourth*. That the judge declared that Spurlock's bond was of no value. *Fifth*. That the judge read the attorneys a lecture and they apologized. *Sixth*. That Spurlock's attorneys begged that the trial might go on. *Seventh*. That the judge lost his temper, and lost it badly.

These statements had reference entirely to past occurrences, merely incidental in their nature, and not involving in any way the merits of the prosecution against Spurlock. The statements as to

what the sheriff and his deputies either did, or failed to do, had no application to any proceeding in court either present or past.

To say of a judge, when referring in a newspaper article to the former and then past trial of a cause, that he lost his temper badly, cannot be fairly construed as tending to interrupt or impede any present or future proceeding in the cause, and hence could not amount to a contempt of the authority of the court in which the trial occurred. Such a statement, whether falsely or truthfully made, might tend to vex and annoy a judge, but it would not rise to the grade of either a libel or a contempt. For these and similar reasons, we feel constrained to hold that none of the statements specifically charged to have been falsely made constituted, in any proper sense, a contempt of the authority of the Clinton Circuit Court. We may say the same as to the entire article of which these statements formed a part. It as a whole, referred only to past proceedings, including the re-arrest of Spurlock. Upon the undisputed facts contained in the article, it was a legitimate subject of discussion whether the discharge of the jury, referred to in it, did not in law operate as an acquittal of Spurlock. *Wright v. State*, 5 Ind. 290; s. c., 61 Am. Dec. 90; *Morgan v. State*, 13 Ind. 215; *Maden v. Emmons*, 83 Ind. 331; *Adams v. State*, 99 Ind. 244.

The publications set out in the second or supplemental information were in a sense sharp criticisms upon the assumed delay of the court in taking action upon Spurlock's application for a writ of *habeas corpus*, but they, in the same connection, announced some general truths, not offensive to any court, and applicable alike to all similar cases.

The statement that Spurlock was a poor man and could "not move the powers to be to act," was a statement of doubtful meaning, in the connection in which it was used, and capable of a construction alike offensive to the court and to all concerned in Spurlock's imprisonment; but in view of the common understanding that men with means possess many legitimate advantages which are not within the reach of men without means, and can hence more readily command the assistance they may need in times of peril, we would not feel justified in inferring that Cheadle, in making the statement, intended to impute either corrupt or mercenary motives to the court. The reference to the "powers to be" was not, in any event, a reference capable of any very definite application, and was in a strict sense a meaningless phrase.

There are cases on record from which an inference might be drawn that the statement in question constituted a contempt, as it was doubtless considered in this case, but it must be borne in mind that the force of public opinion in this country, in favor of the freedom of the press, has of late greatly restrained the courts in the exercise of their power to punish persons for making disrespectful and injurious publications. In many jurisdictions statutes have been enacted depriving, or assuming to deprive the courts of their power in that respect. *Rapalje, supra*, § 56. Such a statute, as applicable to the courts of the United States, was enacted by Congress on the 2d day of March, 1831. Rev. Stats. U. S., § 725.

While the power to punish when contempts are really committed is one which ought to be exercised promptly in proper cases, yet it is in many respects an arbitrary power, and hence one which ought to be kept within prudent limits. This is particularly the policy of the law in regard to indirect contempts. *Haskett v. State*, 51 Ind. 176. No one ought to be found guilty upon a doubtful charge of indirect contempt, and especially so in a case in any manner involving the freedom of the press.

It is true that too often, under the guise of a guaranteed freedom, the press transcends the limits of manly criticism, and resorts to methods injurious to persons and tribunals justly entitled to the moral support of all law abiding citizens; but such digressions are not always unmixed evils, and it is only in rare instances that legal proceedings in repressions of such a license can, with propriety, be resorted to.

When such a digression becomes too flagrant to be disregarded, a prosecution for libel is usually the most appropriate and effective remedy. In such a prosecution both parties go before a jury of the country on terms more nearly equal than they can relatively occupy in a proceeding for the punishment of an alleged contempt. *Stuart v. People, supra*.

These considerations lead us to the further conclusion that neither one of the publications, herein above lastly referred to, constituted a contempt of the authority of the Clinton Circuit Court within the meaning of the statutes and of the authorities cited.

In a case like this a motion to discharge the rule to show cause, entered in the first instance, tests the sufficiency of the information upon which the rule was based. 4 Bl. Com. 286; *McConnell v. State*, 46 Ind. 298; 2 Work's Pr., § 1375.

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Voluminous as they are, we have set out the publications considered in this case *in extenso* simply because we have regarded it as impracticable to make a synopsis of them which would fully display their general scope and character, and intelligibly present all the points made upon them.

The judgment is reversed, and the cause remanded, with instructions to discharge the appellant.

Judgment reversed and cause remanded.

THORN V. WILSON.

(110 Ind. 325.)

License — to construct second story on licensor's building.

A written agreement that one may construct a second story on another's building, and "have and own said second story" for his use perpetually, confers no interest in the freehold.

THE opinion states the case.

R. W. Bailey and H. J. Paulus, for appellants.

A. Steele and R. T. St. John, for appellees.

ELLIOTT, C. J. This controversy arises out of the following agreement:

"Know all men by these presents, that we, Jacob Woollen and Lawrence McDonald, of Grant county, Indiana, of the first part, and Ezra N. Oakley, A. B. Williams and Cyrus Winslow, as a committee on behalf of the order of Freemasons, parties of the second part, of said place, do hereby covenant and agree as follows, to-wit: That Jacob Woollen and Lawrence McDonald agree, for and in consideration of the labor to be performed by the parties of the second part hereinafter mentioned, to erect and complete a building as far as putting in the joists, on lot No. four, block No. three, of Baldwin's addition to the town of Fairmount, Grant county, Indiana, the above to be of the following dimensions: Twenty feet by fifty feet, twelve feet story; and also grant and allow the said parties of the second part to build and complete a story twelve feet high, twenty feet wide and fifty feet long, on the top of

the above mentioned first story of said building, to have and own said second story of said building for the use of the parties of the second part perpetually; also, a stairway in the south-west corner of said building, four feet wide; and the parties of the second part hereby agree, for and in consideration of the use and ownership of the said second story of said house, to build, in a workmanlike manner, the said second story and complete it, and also to build and complete the said stairway."

The building was erected by the parties, and the second story was for a time used and occupied by a Masonic lodge. The appellants claim as grantees of Oakley, Williams and Winslow, and contend that their grantors acquired the ownership of the second story of the building erected under the contract, and that their interest was assignable. The appellees, on the other hand, contend that the grantors of the appellants acquired no right of ownership in the property, but acquired a mere easement, vesting in them a right to perpetually use the second story of the building, and that when the use terminated all their interest in the building was gone, so that they could convey none by deed.

It is quite clear that the part of the building erected by the appellants' grantors does not fall within the rule declared in *Rogers v. Cox*, 96 Ind. 157; s. c., 49 Am. Rep. 152, and kindred cases. This is so because the contract on its face shows such an annexation to the freehold as to make it impossible to separate the part erected by appellants' grantors without a partial destruction of the other part of the building, and in such a case the part annexed is regarded as part of the freehold, and not as personal property. 1 Wash. Real Prop. 4.

It is evident that the instrument relied on by the appellants does not convey an interest in the land, for it is quite clear that if the building should be totally destroyed, the rights of the appellants, and of their grantors as well, would at once terminate.

The complaint proceeds upon the theory that the appellants are the owners of the real estate, and on this theory they must recover, or not recover at all. It is an elementary rule that the recovery must be upon the case made by the complaint, and as the special finding shows that the appellants are not the owners of the land, or any part of it, the case made by the complaint is not sustained. It is true that there may be a freehold interest in part of a building. 1 Wash. Real Prop. (5th ed.) 18. The instrument before

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us however grants a mere use and not a proprietary interest in the *corpus* of the property, and upon such a grant a proprietary interest in the real estate itself cannot be recovered. Whether the appellants might maintain an action to establish and protect an interest in the building in the nature of an easement, is not the question before us and we give no opinion upon it. What we do decide is, that an action to recover the building as part of the land cannot be maintained, for where a mere right to use is granted, no proprietary interest in the *corpus* of the land is conveyed.

Judgment affirmed.

MORNINGSTAR V. CUNNINGHAM.

(110 Ind. 388.)

Evidence — trade usage.

Evidence is admissible to show the usage of particular pork-packers not to keep the product of each customer's hogs separate; also to retain certain portions of the hogs as compensation; also to show that the term "product" in that business has a known peculiar meaning, and does not include those portions of the hogs.*

THE opinion states the case. The plaintiff had judgment below.

J. Buchanan and L. Ferguson, for appellant.

G. W. Grubbs, M. H. Parks, S. Claypool, W. A. Ketchum, W. R. Harrison and W. E. McCord, for appellees.

MITCHELL, J. This was a proceeding to review a judgment recovered by Cunningham and others, against Morningstar, in the Morgan Circuit Court.

[Omitting minor points.]

After the plea in abatement was demurred out, the defendant filed answers and a cross-complaint. The facts put forward in the special answer are briefly: That during the season of 1879-80, Henderson, Parks & Co. were engaged in the pork-packing business, in Martinsville, Indiana. While so engaged, they agreed that if the defendant would purchase and deliver fat hogs, at their packing house, they would advance the money to him to make pur-

*See *Susquahanna Fertilizer Co. v. White*, ante, p. 186.

chases from time to time, slaughter the hogs when purchased, and delivered to them, and prepare the product for market, and honestly account for and deliver such product in good merchantable condition upon the defendant's order. It is further alleged that Henderson, Parks & Co. were also to sell such product upon the defendant's order and account, and reimburse themselves out of the proceeds for the money they should advance. In pursuance of this agreement, Henderson, Parks & Co. advanced over \$25,000 to the defendant. With this and other funds he alleges he purchased twenty-five hundred and fifty head of fat hogs, and delivered them according to his agreement. After the hogs had been purchased and slaughtered, Henderson, Parks & Co. represented to the defendant that owing to the decline in the market the product, if sold then, would not be sufficient to reimburse them for the money advanced, and proposed that if the defendant would execute the note and mortgage in suit, they would carry the defendant's product until there should be a rise in the market. The note and mortgage were executed as requested.

The answer charges that Henderson, Parks & Co. had appropriated a large number of the defendant's hogs to their own use; that they had not kept the product of his hogs separate from their own and others, but had mingled and confused the defendant's with their own, and had converted large quantities of it to their own use, of which facts he was ignorant at the time he executed the note and mortgage sued on. The defendant charges that the value of his property so converted was in excess of the amount of the note, and that hence he was not indebted to Henderson, Parks & Co. at the time the note and mortgage were executed.

The facts stated in the cross-complaint present nothing materially different from those above summarized. After replying in denial generally, the plaintiffs, among other things, replied specially, that it was part of the agreement, in pursuance of which the defendant furnished the hogs to Henderson, Parks & Co., that the hogs furnished were to be slaughtered and packed, and the product accounted for in kind and quality, and that there was no agreement to keep the product of the defendant's hogs separate from others similar in kind. They replied further, that the entire product of the hogs furnished had been accounted for, and that it was insufficient by the sum of \$10,000 to reimburse Henderson, Parks & Co., for the advances made under the contract.

Similar averments are found in the answer to the cross-complaint, with the additional averment, that it was part of the agreement or understanding under which the defendant's hogs were slaughtered, that the product was to be accounted for in kind and quantity, as were the product of other hogs slaughtered at the pork-packing house of Henderson, Parks & Co., with which usage the defendant was, and had been long before, well acquainted.

Upon the issues thus made, there was a trial by a jury, and a verdict and judgment for the plaintiffs in the sum of \$8,000.

During the progress of the trial the plaintiffs were permitted to prove that according to the usual course of business, it was and always had been the usage of the packing house of Henderson, Parks & Co. to retain certain portions of hogs packed by them, such as the bristles, feet, fat from the entrails, and other offal, as compensation for slaughtering and cleaning the hogs, and placing them upon the hooks to cool, and afterward cutting them up.

Evidence was also given over objection, tending to prove that the usage above mentioned was the common usage prevalent in other similar packing houses in the State of Indiana, and that the retention of the offal was but reasonable compensation.

The plaintiff also offered evidence tending to prove that the term "product" as applied to the pork-packing business, had a known meaning peculiar to the trade, and did not include such parts of slaughtered hogs as are mentioned above. Other evidence involving similar principles was admitted.

It is to be observed that the contract, out of which the controversy arose, was oral, and the evidence was such as to leave the terms and meaning of the agreement ambiguous. In such cases, evidence of the known and usual course of a particular trade or business is competent, with a view of raising a presumption that the transaction in question was according to the ordinary and usual course of the business to which it related. *Lyon v. Lenon*, 106 Ind. 567; *Mand v. Trail*, 92 Ind. 531; s. c., 47 Am. Rep. 163; *Wallace v. Morgan*, 23 Ind. 399; *Lonergan v. Stewart*, 55 Ill. 44; *Jonsson v. Thompson*, 97 N. Y. 642.

It is not essential that such a usage should be shown to be so ancient "that the memory of man runneth not to the contrary," nor that it should contain all the other elements of a common-law custom, as defined in the books. 1 Cooley Bl. Com. 76, and note.

The distinction between a usage of trade and a common-law custom has not always been observed. A custom is something which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to the subject-matter to which it relates, and is ordinarily taken notice of without proof. Thus when a payee indorses his name on the back of a promissory note, the law by force of a pervading and universal custom, imports a well-recognized contract into the transaction. *Smythe v. Scott*, 106 Ind. 245; *Walls v. Bailey*, 49 N. Y. 464; s. c., 10 Am. Rep. 407; *Hursh v. North*, 40 Penn. St. 241; *Munn v. Burch*, 25 Ill. 21.

Many other examples of such customs might be given. They are distinguishable from a usage, such as concerns us here. Where a usage in a particular trade or business is known, uniform, reasonable, and not contrary to law, or opposed to public policy, evidence of such usage may be considered in ascertaining the otherwise uncertain meaning of a contract, unless the proof of such usage contradicts the express terms of the agreement. This is so even though the usage be that of a particular person, provided it be known to the parties concerned, or provided it has been so long continued, or has become so generally known and notorious in the place or neighborhood, as to justify the presumption that it must have been known to the parties. *Carter v. Philadelphia Coal Co.*, 77 Penn. St. 286; *Townsend v. Whitby*, 5 Harr. (Del.) 55; *McMasters v. Pennsylvania R. Co.*, 69 Penn. St. 374; s. c., 8 Am. Rep. 264; *Lawson Usages*, 40.

Parties who are engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usages may therefore in the absence of an agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business, as ordinary incidents thereto. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; s. c., 51 Am. Rep. 489; *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277; *Florence Machine Co. v. Dagget*, 135 Mass. 582; *Fitzimmons v. Academy, etc.*, 81 Mo. 37; *Cooper v. Kane*, 19 Wend. 386; s. c., 32 Am. Dec. 512; *Kelton v. Taylor*, 11 Lea, 264; s. c., 47 Am. Rep. 284; 7 Cent. L. J. 383.

Thus where it was the uniform usage of a firm to extend a definite credit, on the sale of goods, it was held competent, in

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order to avoid the statute of limitations, to prove such usage, and that the purchaser knew it. *Hursh v. North, supra*. So in *Walls v. Bailey, supra*, it was held competent to show the usage of plasterers in a particular place, in order to determine the method of measuring plastering done under a contract which stipulated that a certain price per yard should be paid. See also *Lowe v. Lehman*, 15 Ohio St. 179; *Hinton v. Locke*, 5 Hill, 437; *Barton v. McKelway*, 2 Zab. (22 N. J.) 165; *Ford v. Tirrell*, 9 Gray, 401; s. c., 69 Am. Dec. 297.

In like manner it is competent to prove that the words in which a contract is expressed, as respects the particular trade or business to which it refers, are used in a peculiar sense, and different from their ordinary import. *Jaqua v. Witham, etc., Co.*, 106 Ind. 545; *Spartali v. Benecke*, 10 C. B. 212.

The evidence, the admission of which is complained of, was not admitted for the purpose of showing a custom in the technical sense, but to show the general course and usage of the business, as it was conducted by Henderson, Parks & Co. and others, so as to authorize the presumption, in the absence of a special contract, that the transaction in question was according to the usual course of the business to which it referred.

There was evidence tending to show that the defendant had knowledge of the usage in question, that he had dealt with the firm of Henderson, Parks & Co., in respect to packing and slaughtering hogs before. It was also shown that the usage was reasonable, and that it had been adopted generally by packing houses, as the only practical method of conducting the business.

Where the only practical method of conducting a business, such as receiving and storing wheat, and other articles of commerce, is to render to each bailor the amount of goods stored, in kind and quality, it is not a conversion of the goods bailed, if the bailee treat them according to the known and usual method of conducting such business. To constitute a conversion, the bailee's dealing with the property must have been wholly inconsistent with the contract under which he had the limited interest. *Rice v. Nixon*, 97 Ind. 97; s. c., 49 Am. Rep. 430; *Preston v. Witherspoon*, 109 Ind. 457; *Pollock Torts*, 296.

It was competent therefore in the absence of an agreement to the contrary, to show that according to the course of business at their pork-house, Henderson, Parks & Co. did not keep the pro-

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duct of each customer's hogs separate, but that they accounted in kind, quantity and quality to each, according to known, reasonable and recognized rules.

The other evidence in respect to the usage, in pursuance of which certain offal was retained as compensation, was also properly admitted.

The judgment is affirmed, with costs.

STEPHENSON V. STATE.

(110 Ind. 355.)

Criminal law — homicide — evidence — relative strength of parties — opinions — res gesta — subsequent statements.

On a trial for homicide, claimed to have been in self-defense, it is proper to show the relative strength of the deceased and defendant, by facts as to the size, muscular development, activity, apparent health, results of tests of strength, etc., but the opinions of non-expert witnesses are not competent. Statements concerning an encounter made by a party to it, after he has been removed to the office of a physician for surgical attention, and in the absence of the other combatant, are not admissible as part of the *res gesta*.*

CONVICTION of manslaughter. The head-note states the points.

W. R. Moore, J. C. Suit and C. S. Wesner, for appellant

J. V. Kent and W. A. Staley, for State.

ZOLLARS, J. Appellant was charged in the indictment with having committed murder in the first degree.

He was convicted of voluntary manslaughter, and sentenced to the State prison for a term of twelve years.

[Omitting minor points.]

Before proceeding to an examination of the second question discussed by counsel, it should be stated that the mortal wound was inflicted in a combat, and that the claim on the part of appellant is, that he inflicted the wound in self-defense.

Samuel Carson was called as a witness in behalf of appellant. To the following questions he made the following answers: "Q. How

* See notes, 58 Am. Rep. 565; 47 Am. Rep. 52; 37 Am. Rep. 83.

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long did you know Thomas Hardesty? A. Only probably three years; two or three years. Q. Were you with him frequently? A. About as much as four or five times a year. Q. You may describe him to the jury, as to the general appearance of the man, and what kind of a man he was physically? A. He was quite good in stature; a good-looking man; I would call him over the average size of men; a man I consider would weigh 185 or 190 pounds. Q. You may state the kind of a man he was physically as to strength, how he was made, and the character of his flesh, if you know? A. He was a good, strong, robust man; a muscular man. Q. Were you acquainted with the defendant Stephenson? A. Yes, sir. Q. How long have you been acquainted with him? A. A year or eighteen months. Q. How often have you seen him in the last year? A. I have seen him three or four times."

Following the above questions and answers, appellant's counsel propounded to the witness this question: "Were you acquainted with Mr. Stephenson (appellant) and Mr. Hardesty (the deceased) sufficiently to have an opinion as to the relative strength of each of the parties?" Upon objection by counsel for the State, appellant's counsel announced that they proposed to prove by the witness, in response to the question, that it would be difficult to find a man among a thousand to compare favorably with Hardesty in strength, judging from his appearance, in make of limbs, chest and constitution; that he "was as well muscled and as well made" as any man the witness knew; that appellant was the taller man of the two, but very frail in strength; that he has a long, sinewy arm, but no power back of it; that in his (the witness') opinion, Hardesty was by far the abler man in any kind of a contest.

The court sustained the objection to the question, and ruled out the offered testimony. Appellant's counsel contend that it was competent for the witness to give his opinion of the relative strength of the two parties.

It was doubtless competent for appellant to show, in a proper mode, the relative strength of the parties, but we think that it was not competent for the witness to give his opinion upon that question.

It will be observed that the witness had already given the weight of Hardesty, and stated that he was a robust, muscular man. It will be observed also that he had been acquainted with appellant but for a year or eighteen months, and had seen him but three or four times during the year preceding the trial.

He did not state that he had ever seen the parties, or either of them, test or exhibit their strength in any contest or otherwise. He was therefore ill prepared to form or express an opinion of the relative strength of the parties, if opinions by a non-expert witness upon that subject were competent in any case. There are general statements to be found in the books, to the effect that non-expert witnesses may give their testimony, if they first state the facts, but such general statements are not to be understood as stating the rule to be, that such witnesses may, in all cases, give their opinions after stating the facts. If that were so, the rule allowing opinion testimony would be the general rule, and not one of the exceptions, as it is, to the general rule which requires that witnesses shall state facts and not conclusions or opinions.

That non-expert witnesses may give an opinion at all is the rule of necessity and outside of the general rule. When the case is one in which all the facts can be presented to the jury, then no opinion can be given, because the jury are better qualified than the witness to form conclusions. There are cases where the witness cannot put before the jury in an intelligible and comprehensive form the whole ground of his judgment or opinion. In such cases, after, and not until after, the witness has stated all the facts that it is possible to state, he may, from the necessity of the case, give an opinion. When questions as to the condition of the mind and body are the questions in issue, there are often many things in the acts, deportment and appearance of the party, which create a fixed and reliable judgment in the mind of the observer that cannot be conveyed in words to the jury. That a person appears to be sick, sane or intoxicated, may well be known by observation, and yet there is no way to describe the appearance except by the words that necessarily embody the conclusion reached by observation. In such and like cases, the rule of necessity allows a witness to give an opinion. See *Evansville, etc., R. Co. v. Fitzpatrick*, 10 Ind. 120; *Loshbaugh v. Birdsell*, 90 Ind. 466; *Yost v. Conroy*, 92 Ind. 464; s. c., 47 Am. Rep. 156; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138 (142); s. c., 52 Am. Rep. 653; *Bennett v. Meehan*, 83 Ind. 566; s. c., 43 Am. Rep. 78; *State v. Williams*, 67 N. O. 12; *Lawson Ex. and Opin. Ev.*, p. 3, rule 4.

There is nothing in the cases decided by this court, cited by counsel for appellant in conflict with what we have said above, nor that supports the contention that it was competent for the wit-

ness, Carson, to give his opinion of the relative strength of the parties.

In *Jeffersonville R. Co. v. Lanham*, 27 Ind. 171, the witness was treated as an expert. In the case of *City of Indianapolis v. Huffer*, 30 Ind. 235, the witness really stated a fact. In the case of *Hollen v. Board, etc.*, 55 Ind. 194, the witness had peculiar qualifications, and testified as to values, and thus the case was within another exception to the general rule. In the cases of *Leach v. Prebster*, 39 Ind. 492, and *State v. Newlin*, 69 Ind. 108, it was held that non-expert witnesses may give opinions as to the sanity or insanity of a person, first stating the facts, so far as possible, upon which the opinions are based.

Such evidence is an exception to the general rule, and so far as any reason has been assigned for its admission, it has generally been made to rest upon the ground of necessity, it being impossible for the witness to describe in words to the jury the particular appearance, acts, gestures, etc., of the person, which contribute to a firm conviction that he is sane or insane.

Section 69 of Wharton's Criminal Evidence, cited by counsel for appellant, contains nothing more than that in a case of homicide, where the claim is that it was committed in self-defense it is competent to prove that the deceased "was armed with enormous bodily strength and desperate rage."

The manner in which such proof is to be made is not there stated, nor is it held in any of the cases cited by the author, that it may be made by the opinions of non-expert witnesses.

At sections 459 and 460, of the same work, also cited by counsel, the author says: "Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it can not be reproduced and made palpable in the concrete to the jury. Eminently is this the case with regard to noises and smells; to questions of identification, where a witness is allowed to speak as to his opinion or belief, and to the question whether a party believed himself at the time to be in great danger of death. This is also the case as to matters with which the witness is specially acquainted, but which cannot be specifically described. Thus a witness has been permitted to testify that * * * a third person was sick or disabled; that the defendant (or the deceased in cases of homicide) was of fierce temper and great strength."

The general statement of the rule and the reason for it are correctly given by the author. In support of the statement that the witness may give as his opinion that the deceased was of fierce temper and great strength, but one case is cited, and that is the case of *State v. Knapp*, 45 N. H. 148. It may be that a witness who was sufficiently acquainted with the deceased may state that he was a person of fierce temper, but in our judgment he should not be allowed to give his opinion of the relative strength of the deceased and the defendant. The case cited by the author does not hold that the strength or relative strength of a person may be established by the opinions of witnesses. The defendant being charged with rape, it was held that his strength to overcome resistance was material. In proof of that, the witnesses did not give their opinions, but detailed exhibitions of strength on his part, as that on one occasion, as detailed by one witness, he carried a barrel of flour in a certain way, down several stairs or steps, into a cellar; that he had carried a barrel of sugar a certain distance, and seemed to carry them easily; that on one occasion he had put one or more persons out of his tavern house. Another witness testified that he had had a contest with the defendant, and was overcome by his strength, stating at the same time the amount that he (the witness) was able to lift; that he had seen the defendant load wood upon cars, and that he was an active man. Another witness testified that he had had a scuffle with the defendant, and was overcome by him, giving at the same time his own weight as 170 pounds, and the amount he was able to lift. Another witness stated that he had seen the defendant eject a man from a house, in quelling a disturbance, and described the man and the manner in which he was put out. In speaking of that testimony, the court said: "The testimony of Glazier and others, as to the exhibition of strength by respondent in his encounters with others, we think was admissible. It is true that the strength put forth on those occasions was not capable of exact measurement, as in the case of raising a known weight; but it might nevertheless afford better means of judging of his capacity of overcoming such resistance as the prosecutrix might have offered, especially when the size and strength of the persons with whom he struggled were shown. Of course such testimony would not show respondent's exact strength, but it might tend legitimately to show that he possessed ordinary, or more than ordinary strength, and the court could not say that to make out either would not be material."

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It is thus made apparent from an examination of the case, that the opinions of witnesses as to the strength of the defendant were neither called for nor given, and that the court did not hold or intimate that such opinions are competent.

The case of *Cooper v. State*, 23 Tex. 331, also cited by counsel for appellant, lends no aid at all to their positions. After announcing the rule that witnesses can give their opinions only in cases where it is impossible to lay the facts before the jury, it was there held that it was not competent for a witness to give it as his opinion that the fatal shot was fired from a horse or some other elevation.

In speaking of cases where the opinions of witnesses may be received, the court, amongst other things, said: "In all these cases the opinion of the witness is received, because the facts which constitute the cause, from which the opinion proceeds, as an effect, cannot themselves be presented or communicated to the mind of a jury, so as to impart to them the knowledge which the witness actually possesses."

And again: "It is because witnesses have a knowledge of things about which they speak, and have acquired that knowledge in a manner which cannot be communicated, or from facts incapable, in their very nature, of being explained to others, that they may state what they know, in the best way they can. This best way is, by giving in the form of an opinion, that which cannot be put in the form of explanation or narration."

In the case of *Brownell v. People*, 38 Mich. 732, cited by counsel, it was said: "The witnesses who were examined, or offered for examination, and whose testimony was excluded as inadmissible, were personally familiar with both parties and capable of forming opinions about their relative strength, tempers, and other personal qualities, not capable of any description except by opinion. We think this testimony should have been received and not struck out. *Hurd v. People*, 25 Mich. 405."

The above is the whole of the case, both in the way of statement and decision, as to the competency of opinion-evidence, upon the question of strength of the parties.

It will be observed that the questions of the tempers and other qualities of the parties are grouped with the question of their strength. What the "other qualities" in question may have been is not apparent. It may be that those qualities, as the tempers of the parties, could not be described except by opinion, but we do

not think that the same can be said as to the strength of the parties. The case cited gives no support at all to the proposition that a witness may give his opinion of the relative strength of parties in a case of homicide. Such a question was neither made nor decided in that case. All that was there decided is, that in that case, where the defendant claimed to have acted in self-defense, he had a right to show that the deceased was a man of high temper and quarrelsome disposition. It was not there stated that as to those qualities even a witness might give his opinion. As to the mode of such proof, nothing was said or decided.

If the Michigan case may be said to amount to a holding that witnesses may give their opinions of the relative strength of the parties in a case like this, the case of *Cook v. State*, 24 N. J. L. 843, 852, may be set over against it, where in a case somewhat similar, the Supreme Court of that State said: "It was a mere question of relative strength or mechanical possibility, which an athlete or a mechanic could have answered as well as a physician, and every man upon the jury as well as either."

It is not perceivable to us upon what correct and legal theory the witness, Carson, a non-expert witness in the case before us, could be allowed to give his opinion of the relative strength of the parties. There is no ground upon which such testimony could be admitted, unless it is upon the ground of necessity. But we can think of nothing that could in any way aid the witness in the formation of an opinion upon that subject, that he might not have conveyed to the jury in words. He had already informed the jury that Hardesty was a large, robust and muscular man. If he knew it to be a fact, he might have informed the jury that one of the parties was clumsy, and the other active. If Hardesty seemed to be in more robust health than appellant, he could have stated that to the jury. He could have given the weight and described the build of appellant, who was before jury. If he had ever seen a test of the strength of the parties in any kind of contest or otherwise, he could have informed the jury of the result. There could have been nothing about the appearance of the parties indicative of strength, that he might not have readily described to the jury. Indeed the offer by counsel shows that the opinion of the witness, if he had any, was based upon the appearance of Hardesty "in make of limbs and chest," and development of muscle, all of which might have been, and in the main had been, described by the witness.

Stephenson v. State.

Not to extend the opinion further upon this branch of the case, we are satisfied that the court did not err in rejecting the opinion of the witness as to the relative strength of the parties.

Appellant and Hardesty had a difficulty and fight in a saloon. Appellant inflicted the mortal wound with a knife. His claim below was, and is here, that he was acting in self-defense. After appellant had left the saloon, Hardesty was helped from the saloon to a physician's office, upstairs and a few doors distant. After he had been taken to the physician's office, Jacob Aughe went there and had a conversation with him.

Appellant called Aughe as a witness, and asked him to give any statements that Hardesty made to him or to others in the office, in reference to the difficulty with appellant.

In response to an inquiry by the court, counsel for appellant answered that they did not offer the statements as dying declarations. They made the following offer:

"We offer to prove by this witness, in response to this question, that immediately after the occurrence and before any thing had been done toward dressing the wound, he went to the doctor's office, and that he assisted in taking off his clothes and helped to dress the wound; that when he first went up he said to Hardesty, 'How do you do, Tom.' He said, 'How do you do, Jake.' Then he said, 'Are you hurt bad?' Hardesty said, 'I am not.' Witness then said to him, 'Do you feel bad?' Hardesty said, 'No, only I would like to go down and lick him yet. They did me a wrong there. If they had let me alone, I would have killed him.' That the doctor said to him he was afraid it was fatal; that at the same time he, witness, heard a party ask him what started the trouble, and Hardesty said, 'It didn't make any difference about that, at all, what started the trouble,' and refused to tell what started it. And they asked him if Stephenson hit him first, and he said, 'He didn't.' He said, 'I knocked him down first.'"

These statements were not offered as dying declarations, and could not have been admitted as such if they had been so offered, for the reason that Hardesty, at the time, had no apprehension of death. The offered evidence was therefore mere hearsay, and not admissible unless Hardesty's statements were a part of the *res gestæ*, and admissible as original evidence. Just how much time elapsed between the cutting and the end of the fight, and the call of Aughe at the physician's office, is not definitely stated by any of the witnesses.

After appellant had left the saloon, some little time was spent in examining the extent of the cuts, and in persuading Hardesty that he ought to go, or be taken, to a physician. To the time thus consumed should be added, at least, the time necessary to get Hardesty from the saloon to the physician's office. The time is not always so essential, but in order to make such declarations competent, they must be a part of the *res gestæ*, and will not be admitted if they consist simply of narrations or statements of a past occurrence or transaction.

The declarations of Hardesty to Aughe were subsequent to the occurrence to which they related, subsequent to a conversation between Hardesty and others in the saloon after the occurrence and the departure of appellant, and were made in the absence of appellant. Under our cases, and the weight of authority elsewhere, they were not competent, because not so connected with as to be in any way a part of the occurrence. *Binns v. State*, 57 Ind. 46; s. c., 26 Am. Rep. 48; *Bland v. State*, 2 Ind. 608; *Wheeler v. State*, 14 Ind. 573; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Cheek v. State*, 35 Ind. 492; *Jones v. State*, 71 Ind. 66; *Doles v. State*, 97 Ind. 555; *Montgomery v. State*, 80 Ind. 338 (344); s. c., 41 Am. Rep. 815; Whart. Crim. Ev., §§ 262-266, inclusive; *People v. Ah Lee*, 60 Cal. 85.

The case last cited is very similar to the case before us. In that case it was held, after a full discussion and examination of the authorities, that the declarations of the wounded man, made on his way to and in a store-room, to which he ran immediately after receiving the wound, and after the assailant had fled, were not a part of the *res gestæ*, and hence not competent evidence.

Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial.

The clerk will make the proper order for the return of the appellant.

Judgment reversed.

Indiana, Bloomington and Western Railway Company v. Eberle.

INDIANA, BLOOMINGTON AND WESTERN RAILWAY COMPANY V.
EBERLE.

(110 Ind. 542.)

Highway — obstruction — abutting owner — damages.

A lot-owner, whose title extends only to the middle of a highway forty feet wide, cannot maintain an action for damages by an unlawful obstruction eleven feet wide, on the opposite side of the center, caused by the construction thereon of a railway embankment, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel nearer to his lot.

ACTION for injury to real estate. The opinion states the case. The plaintiff had judgment below.

C. W. Fairbanks, B. Harrison, W. H. H. Miller and J. B. Elan, for appellant.

R. Hill and R. N. Lamb, for appellee.

MITCHELL, J. Eberle sued the railway company for an alleged injury suffered by him, as the owner of a lot, upon which he had his homestead, in one of the additions to the city of Indianapolis. He complains that the company has erected an embankment in front of his lot, and that it occupies a part of the highway with its track, over which its engines and cars are operated, and that such occupation renders access to his property difficult and inconvenient, and otherwise damages and depreciates its value. He prayed for damages, and for an injunction.

The special findings of the court present a case like this: The plaintiff was the owner of a lot forty-six feet in width, fronting on a highway forty feet wide. This highway had been by due authority converted into a gravel road, and was known as the "Pendleton Pike." The plaintiff's lot abutted upon the south-east side of the highway, and was occupied by him as a residence prior to the grievances complained of. Before the occupation of the highway by the railroad, the surface-water falling and running thereon was conducted along the north-west side thereof, by means suitable for that purpose, so that it was prevented from flowing upon the plaintiff's lot. In the spring of 1882, the railway company, without

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making or tendering any compensation to the plaintiff, entered upon the north-west side of the highway, opposite the plaintiff's lot, and erected an embankment of earth, eleven feet wide and five and one-half feet in height, along the entire front of the lot. The embankment so erected was a continuation or widening of an existing embankment theretofore made by the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, whose track runs parallel with that of the Indiana, Bloomington and Western railroad for the distance of half a mile or more. Upon the embankment so widened and constructed the defendant has laid its track, over which it has ever since operated its engines and cars. By means of the defendant's roadway so constructed, the highway is permanently obstructed to the extent of eleven feet in width, along the north-west side thereof, thereby reducing it to the width of twenty-nine feet along the front of plaintiff's lot, thus forcing the travel over the highway toward the plaintiff's premises, and rendering ingress and egress to and from the same more difficult and inconvenient. The construction of the embankment has also destroyed the means theretofore provided for carrying off the water along the north-west side of the highway, thereby causing the surface-water to be thrown upon the plaintiff's lot, and into his cellar. The occupation of the highway in the manner described, and the reduction of its width from forty to twenty-nine feet, have, as the court finds, damaged and depreciated the value of the plaintiff's property to the amount of \$500. He has sustained additional damages, amounting to \$10, on account of the flooding of his cellar and premises.

Upon the foregoing facts the court's conclusions of law were that the occupation of the street by the railroad was wrongful and unlawful, and that the plaintiff was entitled to recover "five hundred dollars in damages for the permanent injury to the real estate, by reason of the defendant's entering upon and appropriating eleven feet off the north-west side of the highway," and by reason of the construction of the embankment and railroad track, and running engines and cars thereon, and the consequent narrowing of the street to twenty-nine feet. As a further conclusion, the court stated that the plaintiff was entitled to recover the additional sum of \$10, for damages sustained up to the commencement of the suit on account of flooding of his premises with surface-water.

The question for decision, although presented by intermediate rulings, may be conveniently considered and disposed of upon the

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exceptions to the conclusions of law. Having found that the plaintiff's lot abuts upon the south-east, and that the unlawful obstruction complained of is the occupation of eleven feet in width along the north-west side of the highway, since the line of the plaintiff's lot did not in any event presumably extend beyond the center of the highway, it necessarily follows that the amount allowed by the court for damages sustained on account of the permanent injury to the plaintiff's real estate, must have been for some other injury than the taking and appropriating of, or imposing any additional burden upon the plaintiff's land.

The damages awarded must have been predicated upon the special injury resulting from the fact that ingress and egress to and from his premises were rendered more difficult and inconvenient, and that travel was diverted along that side of the highway, adjacent to plaintiff's lot. Two questions are thus presented for consideration: 1. Can the abutting lot-owner, whose title extends at most to the middle of a highway forty feet in width, maintain an action for damages for an unlawful obstruction, eleven feet in width on the opposite side, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel nearer to his lot? 2. If the action may be maintained, is the measure of damages the injury sustained up to the commencement of the suit, or may it include the permanent depreciation in the value of the property?

Whatever may be the rule of decision elsewhere, nothing is better settled in this State, than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, and legally adhering to the contiguous grounds and the improvements thereon as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot therefore be perverted from the uses to which it was originally dedicated, nor devoted to uses inconsistent with street purposes, without the abutting lot-owner's consent, until due compensation be first made according to law for any injury and damage which

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may directly result from such interference; nor can the street be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot-owner's property, without rendering the wrongdoer liable for such damage. *Town of Rensselaer v. Leopold*, 106 Ind. 29, 31 and cases cited; *Story v. Elevated R. Co.*, 90 N. Y. 122; s. c., 43 Am. Rep. 146; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; s. c., 43 Am. Rep. 661; *Uline v. N. Y. Cent., etc., R. Co.*, 101 N. Y. 98; s. c., 54 Am. Rep. 661; *Lohr v. Metropolitan E. R. Co.*, 104 N. Y. 268; *State v. Laverack*, 34 N. J. L. 201; *Pittsburgh, etc., R. Co. v. Reich*, 101 Ill. 157; *Brainard v. Missisquoi R. Co.*, 48 Vt. 107.

Those having the control of streets and highways may authorize the laying thereon of railroad tracks. In this manner the public servitude may be abridged, or measurably discharged. But the private rights of those who have adapted their buildings and improvements to an existing highway, and who are deprived of access to, or are injuriously inconvenienced in a substantial degree in their means of egress from their lots, by the construction of a railroad, are in nowise effected by the permission obtained from the public authorities. As to such persons, so long as their private and individual interests in the street have not been lawfully acquired, the railroad company remains liable for all special and particular damages resulting directly to their property from the obstruction of any part of the street. In so far as the railroad obstructs, or presents a substantial and injurious interference with, the ordinary means of access to the lot, it is as to the owner an unlawful obstruction. It is a nuisance in the street, and the railroad company becomes a trespasser on the lot-owner's property, whether its structure be laid upon his soil or not.

In the absence of an actual taking of property, or that which is regarded as property, such consequential or incidental damages, as result to the abutting lot-owner from the construction and operation of a railroad upon the land of another, afford no right of recovery. *Transportation Co. v. Chicago*, 99 U. S. 635; *Hatch v. Vermont, etc., R. Co.*, 20 Vt. 49.

In case the structure imposes no additional burden upon his soil, the right of the lot-owner to maintain a common law-action for an injury depends upon whether or not the occupation of the street results in damage peculiar to his property, and different in kind from that which is suffered by the community in general.

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Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113; *Dwenger v. Chicago, etc., Ry. Co.*, 98 Ind. 153; *Sohn v. Cambern*, 106 Ind. 303; *Cummins v. City of Seymour*, 79 Ind. 491; s. c., 41 Am. Rep. 618; *Ross v. Thompson*, 78 Ind. 90; *Hanlin v. Chicago, etc., Ry. Co.*, 61 Wis. 515; *Hobart v. Milwaukee, etc., R. Co.*, 27 Wis. 194; s. c., 9 Am. Rep. 461.

The community in general does not of course mean those persons who use the street or highway, and yet reside at such a distance from the railroad as to suffer none of the annoyances or inconveniences incident to its construction and operation. The interest in the street which is peculiar and personal to the abutting lot-owner, and which is distinct and different from that of the general public is the right to have free access over it to his lot and buildings, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred. In this respect, and in this only, is the interest of the abutting property-owner different in the street in front of, and beyond the line of, his lot from that of the public.

The location and operation of a railroad upon a public highway may occasion incidental embarrassment and inconvenience to an abutting lot-owner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on the soil, his injury and damage, while different in degree, are the same in kind as are those of the community at large.

For such merely incidental damages as result from the careful construction and prudent operation of a railroad on the land of another, even though it be in a public street, the adjacent proprietor cannot recover. These are injuries common to all those whose lands are in such close proximity to a railroad which happens to be located on the land of another, as to suffer incidental injury therefrom. For such injuries or inconveniences, in the absence of a statute giving him redress therefor, the property-owner is not entitled to maintain an action. *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich. 62; s. c., 31 Am. Rep. 306; *Cent. Branch, etc., R. Co. v. Andrews*, 30 Kans. 590; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379; s. c., 40 Am. Rep. 598; *Rigney v. City of Chicago*, 102 Ill. 64.

The practical question still remains, does the fact that the appellant constructed an embankment, eleven feet in width, on the opposite side of the street, thereby reducing it in width, and forcing travel to the side next the plaintiff's lot, which he occupied as a residence, and rendering access thereto "more difficult and inconvenient," affect the plaintiff in a manner so substantially different from the common public as to entitle him to maintain an action for damages?

No general rule can be stated which will define the extent of the interference or deprivation in each case, in order that an action may be maintained. The purposes for which property is used, and its adaptation to the street, in respect to the improvements made thereon, and the width of the area necessary for access, are so various in different cases, that the diminution of the width of the highway might be a serious injury in the one case, while in another it might amount to no greater inconvenience than would be suffered by the public in general. This much may however be said generally: Where the owner of a lot is entitled to exercise a right, which he possesses in common with the public, and the exercise of which is necessary to the enjoyment of his property in the usual manner, in order to warrant a recovery for an invasion of such right, it must appear that the obstruction complained of presents a physical disturbance of the right so possessed, so as to prevent or impair its use in the manner in which it was theretofore actually used and enjoyed, and the disturbance of the right must have resulted in peculiar damage to and depreciation in the value of the property to which the right is appendant. *Metropolitan Board, etc., v. McCarthy*, 10 Eng. Rep. 1; *Fritz v. Hobson*, 14 Ch. Div. 542; 19 Am. Law Reg. 615, and note.

There are no facts found in the case before us, from which it can be said that the embankment on the opposite side of the street, in front of the plaintiff's lot, presents any obstruction to the means of ingress and egress to and from the buildings and improvements thereon. It does not appear that he had ever in any manner used any part of the eleven feet on which the appellant's track is constructed as a means of gaining access to his property, nor are there any facts found from which the necessity or propriety of using that side of the street, in order to approach his lot, is apparent. All that is found is that the obstruction forces the travel over the highway nearer his lot, and makes access thereto more difficult and

inconvenient. That however does not show that the erection of the embankment presents any substantial interference with his right of access over the highway as it was previously enjoyed and used, nor does it show any inconvenience of a kind different from that to which the community at large is subjected. The highway may be more difficult and inconvenient of passage at that point by all who use it, precisely as it is inconvenient as a means of access to the plaintiff's lot. That the plaintiff, on account of the proximity of his residence, and because he uses the highway more frequently, may suffer inconvenience greater in degree than others, may be conceded. From any thing that appears, the inconvenience suffered by him is not different in kind from that suffered by others. More inconvenience or disadvantage, so long as the obstruction complained of does not in some substantial degree impair or deprive the plaintiff of the usual and ordinary means of access to his property, cannot give a right of action. *Cummins v. City of Seymour, supra*; *Powell v. Bunker*, 91 Ind. 64; *Lansing v. Smith*, 8 Cow. 146.

Until it is found that the part of the highway obstructed was in some way necessary in order to afford access to, or an outlet from the plaintiff's property, as he had been accustomed, and had the right to enjoy it, the injury to the plaintiff is of the same kind as that suffered by the community in general. *Venard v. Cross*, 8 Kans. 248.

Upon the facts found, the case before us is in strict analogy to that of *Harvard College v. Stearns*, 15 Gray, 1, and cases of that class. The case cited rested upon a claim for injury to land, occasioned by an obstruction placed in a navigable river or public way, whereby the plaintiff's land was rendered more difficult of access, and less valuable. It was held that no recovery could be had. *Blackwell v. Old Colony R. Co.*, 122 Mass. 1.

In so far as the obstruction disrupted and destroyed the means theretofore provided for carrying off the surface water, and for preventing it from flowing upon the plaintiff's land, the damage was of that character for which a recovery may be sustained.

Upon the whole case, our conclusion is that justice requires that a new trial should be ordered, to the end that the facts may be inquired of, with a view to the principles herein set forth.

In respect to the second inquiry: Whether the plaintiff may recover for the permanent depreciation in the value of his property, depends upon the permanent character of the injury, and the frame

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of the action. Where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire as a result of the suit, the plaintiff's title to the right appropriated, we can see no reason why the damages may not be assessed on the basis of the permanent depreciation in value of the property injured, as in *Henderson v. New York, etc., R. Co.*, 78 N. Y. 423; *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268; *Witchita, etc., R. Co. v. Fechheimer*, 12 Pac. Rep. 362; *Wood Nuis.*, § 856; *City of North Vernon v. Voegler*, 103 Ind. 314.

Where the action is in trespass, to recover for a past injury, treating the obstruction as unlawful, without any recognition of the right of the defendant to continue the obstruction, and acquire the right appropriated from the recovery and payment of a judgment, then the principles controlling the case of *Uline v. New York, etc., R. Co.*, *supra*, and the cases there cited, should govern. In that event, only such damages as accrued up to the time of the commencement of the action are recoverable. An examination of the complaint in this case does not make it entirely clear which remedy the plaintiff intended to pursue.

For the reasons heretofore given the judgment is reversed, with costs, and a new trial ordered.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

EVANS V. BRYAN.

(35 N. C. 174.)

Partnership — lien of partners — exemption.

One partner has no lien on a copartner's interest in the partnership property for a debt due to him from the copartner.

THE opinion states the case. The defendant had judgment below.

Thos. H. Sutton, for plaintiff.

W. A. Guthrie, for defendant.

MERRIMON, J. It appears from the agreement under seal, that the intestate of the plaintiff was the owner of a newspaper and printing establishment, in the town of Fayetteville, and it likewise appears from its terms, too plainly to admit of question, that he sold to the defendant an undivided one-half interest in the property mentioned, for the price of \$1,250; that of this sum the defendant paid to the intestate \$714, in cash, and the balance he discharged by promissory notes, including one of himself, payable to the intestate, for \$350.

This sale was unconditional and without qualification; no lien upon the property of any kind was provided to secure the payment of the note. Thus the interest in the property so sold became absolutely that of the defendant, to be used, sold or disposed of

as he might see fit, consistently with the rights of the intestate, the latter having reserved a "one-half interest in the entire establishment * * * for his own use."

It seems that this sale was made in contemplation of a business partnership between the intestate and the defendant, for upon its completion, they at once formed a partnership "for the publication of said paper, and also for conducting the job-printing and general stationery business in said town." It was agreed that the parties should be "equal as to capital invested; the general profits and losses of the concern shall be equally divided in general settlements, as often as may be mutually agreed upon." It was intended that the parties should be upon an equal footing in all respects. The obvious purpose was to form a partnership, in which the parties were to contribute equally to the capital to be employed, and share equally in the profits and losses. Hence, the intestate sold to the defendant an undivided one-half interest in a business he had already established, taking his note for a part of the purchase money. It does not appear that an increase of the capital of the partnership was intended, or that it was increased after its formation. Nor does it appear from the agreement, neither from its terms, nor by implication, that the parties agreed that the note of the defendant should constitute a part of the capital of the partnership; it does not appear in any way that the partnership ever had any interest in it; it was made payable to the intestate, and so far as appears, it continued to be his separate property, until his death, and now belongs to the plaintiff or his administrator. Nor does it appear from the agreement, or otherwise, that the intestate had a lien upon the defendant's part of the capital of the partnership to secure the payment of the note, nor that he had the right to receive of the defendant's share of the profits a sum of money sufficient to discharge the note. Nor does it appear that the note was treated in any sense as an advancement of money for the partnership, or that he desired or intended that it should be so treated.

So that the plaintiff is no more entitled to have the note in question paid out of the defendant's share of the assets of the partnership, than if it had been given for a horse or other consideration in no way connected with the partnership property. It seems to us that the contention of the appellant is entirely unfounded.

The intestate had a specific lien on the property of the partnership, for its debts and liabilities due to other persons, for his share

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of its capital and funds, for all moneys advanced by him for its use, and for debts due it from the defendant, if there were such, beyond his share, but he had no such lien for a debt due to him for property he sold to his copartner, in the absence of a special contract to that effect. Story Part., § 97.

It appears that the defendant has no property, except his share of the assets of the partnership above mentioned. As the intestate of the plaintiff had no lien upon these assets, the defendant is entitled to have his personal property exemption set apart to him out of the same, according to law.

The defendant's share of the assets of the partnership must be treated as if they were in his hands as surviving partner. When he consented to allow the plaintiff to wind up and close the affairs of the partnership, he expressly reserved to himself the right to claim and have his personal property exemption set apart to him.

There is no error, and the judgment must be affirmed.

No error.

Judgment affirmed.

PARKER V. McDOWELL.

(95 N. C. 219.)

Negotiable instrument — accommodation note to be discounted at particular bank — diversion.

Where a note was made and indorsed for accommodation, negotiable and payable at a particular bank, and was not discounted there but was sold to a private individual, without the indorser's knowledge, *held*, that the indorser was liable.

ACTION on a promissory note. The head-note states the case. The plaintiff had judgment below.

C. C. Lyon, for plaintiff.

Thos. H. Sutton, for defendants.

ASHE, J. The defendant insisted there was error in the judgment of the court below, and to sustain his contention, relied upon the decision of the court in the cases of *Respass v. Latham*, Busb. 134; *Dewey v. Cochran*, 4 Jones, 184, and *Southerland v. Whitaker*, 5 Jones, 5. But these decisions do not have any application to the

case under consideration. *Respass v. Latham* was an action upon a sealed instrument, brought by the assignee against the obligees. The obligees refused to receive the bond, and returned it to one of the obligors. Some eight days after its presentation and refusal, the person named obligee was induced to sign an indorsement "without recourse" to the assignee, who brought the action against the obligors, and it was held that the bond was void for want of delivery. The action in *Dewey v. Cochran*, was upon a promissory note, payable to "Thomas W. Dewey, cashier, or order, negotiable and payable at the branch of the Bank of the State of North Carolina at Charlotte," and signed by Caldwell & Huggins, as principals, and by R. T. McIntyre and W. B. Cochran, as sureties. The note was presented at the bank, and the holder was informed by the president of the bank that the bank would not discount it. The note was thereafter transferred by one Huggins, a partner of the firm of Caldwell & Huggins, to Farrior & Bros., of Charleston, South Carolina, in payment of a debt due them by Caldwell & Huggins. The action was brought in the name of Thomas W. Dewey. There was a special verdict, finding the foregoing facts, and the court rendered judgment of nonsuit against the plaintiff, on the ground that Dewey had never accepted the note; that his assent to it was essential to the validity of the contract; that he had not the legal title to the note, and therefore the action could not be maintained in his name, and on the further ground, that by making the note payable to the cashier of the bank, and negotiable at the bank, it showed upon its face that the undertaking of the sureties was, that it should be discounted there and nowhere else.

In the case of *Southerland v. Whitaker*, the note upon which the action was brought, was in its terms identical with the note in *Dewey v. Cochran*. It was payable to William Reston, cashier. It was never presented to the bank to be discounted, and when past due W. Reston was requested by one Kelly to indorse it in blank, "without recourse," which he did, and it was never delivered to him or accepted by him, under any contract or agreement with the makers or either of them, and that he had no title or interest in the note, and nothing was paid him for it by Kelly, who thereafter indorsed it without consideration to the plaintiff, to enable him to bring the action in Duplin county. It was held that the note was void, because it was manifest upon its face, being payable to the cashier, that it was the understanding of the parties that it should

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be discounted at one of those banks designated in the note, and for the further reason that there was no proof of a consideration. But PEARSON, J., who delivered the opinion in that case, proceeded to say: "There is a distinction between that case, and when the note is payable to the seller." The intent that it is to become a note, and have validity from the time it is written, and its being made afterward negotiable and payable at bank, is a collateral circumstance, introduced for the accommodation of the seller, and not intended to affect the validity of the note.

The note upon which this action was brought was what is called an accommodation note, and is in the following words and figures:

"Sixty days after date, I promise to pay to A. Moore, or order, two hundred and five dollars, for value received, negotiable and payable at the People's National Bank of Fayetteville, N. C., with interest after maturity at the rate of eight per cent per annum until paid, for money loaned.

(Signed.)

N. A. STEDMAN, JR."

On the back of the note were written the names of John A. McDowell and A. Moore.

The case of *Ray v. Banks*, 6 Jones, 118, was similar to this, and the note upon which the action was founded was so far identical in its terms with that in this case, that we think the adjudication there is decisive of this case. The note there was made by James Banks, payable to William S. Mullins, ninety days after date, negotiable at the Branch Bank of Cape Fear, at Fayetteville, or at the Bank of Fayetteville, at the option of the holder, and indorsed in blank by W. S. Mullins and McKethan. Banks, at the date of the note, being indebted to Ferdinand McLeod in an amount agreed to be that of the note, transferred the note to him in payment of the indebtedness, and McLeod indorsed to the plaintiff for value. The note was never discounted or offered for discount at the bank. It was held by this court, that the plaintiff, the indorsee of McLeod, could recover against the maker of the note, or any of the indorsers thereon, though it had never been discounted at bank, nor offered for such purpose. Judge RUFFIN, delivering the opinion of the court, distinguished the case from that of *Dewey v. Coburn*, and *Southerland v. Whitaker*. He said those cases were much mis-construed in applying them. "They were not intended to affect, and do not affect, notes and indorsements founded on ac-

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tual transactions for value; as for example notes given upon sales, or intended to raise money in the general market. The decision applied to the cases before the court, which were of notes made to enable the principal to borrow money from a bank, and with that purpose sufficiently indicated, as it was thought, on the face of the papers themselves." The notes in these cases were payable to the cashiers of the banks; in the case of *Ray v. Banks* it was payable to Mullins. Hence the distinction.

The opinion of the learned judge is fully sustained by Daniel in his work on Negotiable Instruments, vol. 1, § 792, where it is said: "It is now well settled, that when a note is indorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in the payment of a debt or otherwise for the credit of the maker."

There is no error. The judgment of the Superior Court is affirmed.

No error.

Judgment affirmed.

KING V. PHILLIPS.

(35 N. C. 245.)

Interest — when recoverable.

Where interest is not payable on the face of the instrument, payment of the principal bars an action for the interest, but where interest is stipulated for in the contract, it is a part of the debt, and may be recovered even after payment of the principal.

THE head-note states the point.

Geo. Rountree, for plaintiff.

W. R. Allen, for defendant.

ASHE, J. Upon a careful consideration of the errors assigned, we see no reason for overruling the decision made at the last term. We do not think there was any error in the interpretation given by this court to the finding of the jury upon the second issue. But conceding its meaning was such as contended for by the defendant, that it establishes the fact that the principal had been paid, and

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only the interest remained unsettled, still we are unable to see the error complained of by the defendant. It is true this court did not take into consideration the question now presented as a ground of error, that the action could not be sustained for the interest after the principal had been paid, but if it had done so, it could have come to no other conclusion than it did; for there is a marked and admitted distinction between these cases where the interest is stipulated to be paid in the note or bond, and when there is nothing said with respect to the interest, and it is left to be recovered as a part of the damages for the retention of the debt.

To be more specific. When interest is not made payable on the face of the instrument, it is in the nature of damages for the retention of the principal debt. *Hamilton v. Van Rensselaer*, 43 N. Y. 244; Byles Bills, 240. And in such a case the payment of the principal is a bar to an action to recover the interest. *Hamilton v. Van Rensselaer*, *supra*; *Hentz v. Miller*, 94 N. Y. 64.

But when interest is stipulated for in the contract, it is as much a part of the debt as the principal itself. 1 Dan. Neg. Inst. 919; 2 Edwards Bills and Notes, § 1012; *Boddily v. Bellamy*, 2 Burr. 1096; *Southern Central R. Co. v. Town of Moravia*, 61 Barb. 180; *Fake v. Eddy*, 15 Wend. 76, and *Bledsoe v. Nixon*, 69 N. C. 80; s. c., 12 Am. Rep. 642, where the distinction here drawn is clearly stated. It was there held, "when there is no agreement to pay interest, interest, when allowable, is allowed not as a part of the contract, but as an incident, and by way of damages for the default to make the creditor good for the loss he has sustained by reason of the breach of contract." In this class of cases, it has always been held that after the principal of the debt has been paid and received in full, no action could be maintained to recover interest, the reason being that interest in such cases, being a mere incident, cannot exist without the debt, and the debt being extinguished, the interest must necessarily be extinguished also.

A distinction has been made between such cases and those where interest is payable by the terms of the contract. In the latter case, the interest is as much a part of the contract as the principal, and not a mere incident.

The case of *Moore v. Fuller*, 2 Jones, 205, which was relied on in the argument when the case was first before us, is a case where the bond sued on was silent as to the interest, but in the case now under consideration, there is an express stipulation to pay interest, which

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according to the authorities is not a mere incident to the debt, but as much a part of it as the principal itself. Consequently there is no reason why in such case the interest may not be recovered even after the principal has been paid.

We see no reason for disturbing the decision heretofore made. The petition is therefore dismissed.

Petition dismissed.

BETHEA V. BYRD.

(95 N. C. 306.)

Evidence — declarations as to boundaries.

Declarations of deceased disinterested adjoining owners of land are admissible to prove private boundaries.

THE head-note states the point. The plaintiff had judgment below.

J. H. Fleming, for defendant.

MERRIMON, J. It is settled by numerous decisions of this court, that the declarations of deceased persons who were disinterested at the time such declarations were made, in respect to boundary lines and corners of land, are competent evidence to prove their location, if such persons had opportunity to be informed in respect thereto. It is true, that such evidence is hearsay in its nature, but it has been deemed necessary to classify it with, and make it one of the exceptions to the general rule of law, that hearsay is not competent as evidence. Whether this exception comes strictly within the spirit and reason of the rule may admit of some question, but however this may be, it is now, and has been for a long period, the law of this State. The reason of the exception seems to have been, and indeed still is, the circumstances of the country, and the uncertainty, confusion and indistinctness generally of boundary lines and corners of tracts of land that belong to individuals.

These and like considerations have rendered the exception necessary. Such evidence is not of a very high type, and may not ordinarily be very satisfactory, still it is found that it subserves the

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ends of justice. *Sasser v. Herring*, 1 Dev. 341; *Hartzog v. Hubbard*, 2 D. & B. 241; *Mason v. McCormick*, 85 N. C. 226; *Fry v. Currie*, 91 N. C. 436; *Halstead v. Mullen*, 93 N. C. 252.

Such declarations are not however evidence, if the person making them is still alive, in or out of this State, nor if made by a person interested at the time of making them, however long ago they may have been made, nor if made by deceased persons *post litem notam*. They must be such as were made by a person entirely disinterested, and they will have more or less weight, accordingly as the maker of them had opportunity, good or indifferent, to have knowledge of the boundary line or lines, or corner referred to, and he may have made them casually and loosely, or with care and upon consideration. *Smith v. Dutton*, 1 Car. L. R. 524; *Hartzog v. Hubbard*, *supra*; *Dancy v. Sugg*, 2 D. & B. 515; *Hedrick v. Goble*, 63 N. C. 48; *Caldwell v. Neely*, 81 N. C. 114; *Mason v. McCormick*, *supra*.

The declarations mentioned in the exception, as offered by the appellant, and which were rejected by the court, seem to us to have been pertinent and competent. They were of a person deceased, made many years ago. It does not appear that he had the slightest interest in the location of the corner which he pointed out to the witness as that of the grant in question, at the time he did so, or indeed at any time. He did not, so far as appears, claim under that grant, or against it, or have any interest in it, and if he claimed a tract of land adjoining that of the grant, under a grant prior to it, this could not of itself render him interested. The mere fact that he was the owner of an adjoining tract of land did not necessarily make him interested — he was not seeking to point out his own corner, but that of the “Clevins grant” — not to promote his interests and advantage — to enlarge or change his boundary, or those of any other person. So far as we can see, he was content with his own lines and boundary. It seems that he was entirely disinterested, and his declarations come exactly within the exception above pointed out. He had lands adjoining the lands embraced by the grant, and therefore very likely had knowledge of the lines and corners of the grant, coincident with his lines, and he could probably speak knowingly and advisedly. The case of *Mason v. McCormick*, *supra*, is in some respects like this. In that case the chief justice said: “The declaration moreover is not used to ascertain and fix the limits of the declarant’s own land, but the

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corner of an adjoining tract, to determine its location, and the evidence is not rendered incompetent because that corner is coincident with one of his own boundaries." *Fry v. Currie, supra*, and *Hilstead v. Mullen, supra*, are to the same effect.

It behooved the appellee to show that the person who made the declarations in question was interested at the time he made them. As we have seen, the facts that he was "an adjoining proprietor," and that he "claimed under" a junior grant, did not prove that he was interested. If there were other facts tending to show that he was, these ought to appear. As such facts do not appear in the record, it must be taken that they did not on the trial.

There is error, because of which the appellant is entitled to a new trial. To that end, let this opinion be certified to the Superior Court, according to law.

Error.

Judgment reversed.

HODGES v. WILLIAMS.

(95 N. C. 231.)

Water and water-courses — lake — reliction.

A lake, in North Carolina, fifteen miles by eight, three and a half feet deep, with no important inlet, and forming no link in a chain of water-communication, is not navigable, and a riparian owner thereon has no title to the land under it as against the grantee of the State, upon gradual reliction.

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

E. F. Aydlott, for plaintiff.

Geo. H. Brown, Jr., and *J. W. Albertson*, for defendants.

ASHE, J. In considering the questions involved in this appeal, that which presents itself *in limine* is, whether Mattamuskeet lake is a navigable water. If navigable, then the land covered by its waters is not the subject of entry and grant, and the doctrine of accretion applies; but if not navigable, then the soil underlying its waters is the subject of entry and grant, and when granted, is the private property of the grantee.

By the common law, the criterion for determining whether a water was navigable or not, is the ebb and flow of the tide, extend-

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ing so far up the rivers entering into the sea as there is a flux and reflux of the tide. Gould Water-Courses, § 42.

But the tidal test has no application to the rivers and other waters in this State, as it has not in any of the other States. It has been decided in most of the States as inapplicable to the geographical condition of this country.

The decisions of the courts in the different States of the Union are so diverse on this question, that it is needless to go beyond our own decisions to determine what are navigable waters.

The criterion adopted by this court in several adjudications upon the subject is, that all waters which are actually navigable for sea vessels are to be considered navigable waters under the laws of this State.

In *Collins v. Benbury*, 3 Ired. 277; s. c., 38 Am. Dec. 722, it is held that a navigable stream in this State does not depend upon the common-law rule, but waters which are sufficient in depth to afford a common passage for people in sea vessels, are to be taken as navigable. And in *State v. Glenn*, 7 Jones, 321, Judge BATTLE in his opinion used this language: "We hold that any waters, whether sounds, bays, rivers or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is not the subject of entry and grant under our entry laws." And in *Wilson v. Forbes*, 2 Dev. 30, the court made it no question as to what general rule was to be adopted to determine the character of a water-course, but held that a stream eight feet deep, sixty yards wide, and with an unobstructed navigation for sea vessels from its mouth to the ocean, is a navigable stream, and its edge at low-water mark is the boundary of the adjacent land, and it was in that case held that any water-course not navigable for sea vessels, but capable of being navigated by boats, floats and rafts, technically styled navigable streams, are the subject of special grant by the State under the entry law.

This lake is not a navigable water under the laws of the United States, for it has been held in 11 Wall. 411, that a water-way wholly within a State, and not connected with other waters, rivers and streams leading to the sea, is not navigable. But this lake had no such connection. Being then not a navigable water under the laws of the United States, the question remains, is it navigable under the laws of this State? According to the definition of navigable waters as given in these cases, they must be navigable for

sea-going vessels. But this rule has been somewhat modified by the recent decision of the court in *Broadnax v. Baker*, 94 N. C. 675; s. c., 55 Am. Rep. 633.

But that decision is not really inconsistent with the authorities cited. It only qualifies them by holding that in this State the question whether a water is navigable, not in a technical sense, but as a public highway, has reference to the operation of our entry laws upon their underlying beds. The principle there decided is that whenever a water-course has a capacity to float freight and passenger boats, whereby they become highways or channels of commerce, the right to use them as such becomes paramount to any rights of a riparian proprietor, or even the owner of the soil over which the waters flow. The consistency is apparent in what is said in the opinion in *State v. Glenn, supra*, where the grant covered the soil under the stream: "As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil clear across the river, subject to an easement in the public for the purposes of the transportation of lime, flour and other articles in flats and canoes." It was in this sense only that the water of the lake was navigable, if at all, for the bed of the lake had been the subject of entry, as we will hereafter show.

We have not overlooked the fact that it was held in *Den v. Sermon*, 1 Hawks, 56, to be navigable. But that case does not seem to have occupied very seriously the attention of the court, nor does the report of the case disclose what was the evidence in the court below upon the question of its navigability.

But in the case before us the facts are that fifty or more years ago the water in the deepest part was from eight to eleven feet deep, but what portion of it was that depth is not made to appear.

Forty years ago it was in the deepest part six feet deep, and at the commencement of this action only three feet in depth. This reduction in the depth of the lake has been effected gradually and imperceptibly by three canals, cut about the year 1835, and within a few years thereafter, connecting the lake with Pamlico sound. Fifty or sixty years ago the lake was, and still is, navigated by canoes. At one time a flat-bottom boat, with mast and sail, carried corn, staves and other produce from one side of the lake to the other, and about 1862 or 1863 an open boat loaded with produce passed through and out of the lake through one of the canals to New Bern.

The infrequency of this sort of navigation is strong evidence that the lake was not a navigable water in the sense of the definition. Just such craft, except as to the sail and mast, pass down the Yadkin river, and it was held in *State v. Glenn, supra*, that that was not a navigable stream. A mast and sail do not make a boat a sea-going vessel. They may be used on any kind of vessel, even upon a raft, and are often seen upon canoes and other small craft.

In New York it has been held that an inland lake, five miles long and three-quarters of a mile wide, which has no important inlet and does not form part of a chain of connecting water, is subject to the common rule as to fresh-water streams. *Ledyard v. Ten Eyck*, 36 Barb. 102. And in New Jersey it has been held that a fresh-water lake three miles long and one mile wide, and of a sufficient depth to float large vessels, but which had no navigable outlet and had never been navigated by vessels larger than a fishing craft thirty feet long, was private property. *Cobb v. Davenport*, 32 N. J. L. 337. And without going beyond the State for these authorities the State has recognized and virtually declared the lake to be unnavigable, by grants of parts of the land covered by its water as early as 1795 and 1819, and by the several acts of 1827, 1835 and 1855, prohibiting the entry of the lands covered by the waters of any lake which shall be gained by the recession, draining or diminution of such waters, and the last act expressly excepts all grants theretofore lawfully made.

The plaintiff did not connect himself with any grants, but his title by possession since 1824, and color of title to the tract of land bordering on the lake, was admitted; and he claimed the land in controversy, which is caused by the reliction of the water of the lake, and was in the possession of the defendant Williams. The plaintiff had never had any possession of land, but claimed it as riparian owner by virtue of the recession of the water of the lake.

The question then arises, can he claim the relict land of the lake shore by such a title? It is well established, that in navigable streams the riparian proprietor owns the land, *usque ad filum aquæ*. *Williams v. Buchanan*, 1 Ired. 535; s. c., 35 Am. Dec. 760; *Ingram v. Threadgill*, 3 Dev. 58. Of course this principle cannot apply when the bed of the stream had been previously granted. We find no case where this principle has been applied to large bodies of water like this lake, which is fifteen miles long and eight miles wide; and it cannot apply to this lake because the land in

dispute covered by the water of the lake had been granted by the State prior to any title acquired by the plaintiff to the land bordering upon its shore, as shown by the facts found by his honor.

If then the plaintiff by his grant acquired no title to the land in dispute covered by the water of the lake, he could not acquire any to the land relicted by the recession of the water, for that right is derived mainly from the rule that the riparian proprietor is owner of the soil under the water, and by the general law of property becomes entitled as of right to all accessions. See 9 Cush. 344, and *Ingraham v. Wilkinson*, 4 Pick. 268; s. c., 16 Am. Dec. 342.

To illustrate this principle in its application to unnavigable streams, suppose the State has granted the land in the bed of the stream covered by the water to A., as we have shown it may do, and afterward grants the land on each side of the stream to B. and C. respectively, calling in each grant for the margin of the stream as the boundary, and the river afterward changes its course, so as to leave the bed of the stream bare, the relicted land would belong to the grantees of the bed of the stream, no matter whether the reliction occurred suddenly or gradually and imperceptibly, for in such a case the riparian proprietors had no right to the land covered by the water, by virtue of the principle of ownership *ad filum aquæ*. The case is analogous. Here the land covered by the water of the lake, had been granted by the State prior to any grant of the plaintiff, and by his grant he acquired title only to the margin of the lake, and none to any of the land of the lake covered by its water. When the land in dispute, then being covered by the water, was reclaimed, the relicted land would belong to the first grantee and not to the plaintiff as riparian owner. This principle of course does not apply to lands relicted by the recession of the sea, or other waters technically navigable, for then the principle is well settled, that if the land covered by the water, lying adjacent to the shore, is relicted by a sudden recession of the water, the land belongs to the sovereign, but if relicted gradually and imperceptibly, it belongs to the riparian proprietor.

But we have shown upon the facts found and the authorities to which we have had reference, that this lake is not navigable water, and our conclusion is the plaintiff has failed to make out his title to the land in controversy, and that there was error in the judgment of the Superior Court.

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This opinion will therefore be certified to the Superior Court of Hyde county, that a *venire de novo* may be awarded.

Error.

Judgment reversed.

 FREIGHT DISCRIMINATION CASES.

(95 N. C. 488.)

Constitutional law — commerce — discrimination in railroad freights.

A statute imposing a penalty on any railroad which shall charge, for the transportation of any freight over its road, a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other States.*

ACTION for penalties. The opinion states the case. The plaintiff had judgment below.

J. M. Mullen and John A. Moore, for plaintiff.

W. H. Day, J. W. Hinsdale, A. W. Haywood, John L. Bridgers, A. C. Zollicoffer and Ernest Haywood, for defendants.

SMITH, C. J. The statute with the violation of which the defendant is charged in the present action, instituted for the recovery of the penalty imposed, is in these words: "It shall be unlawful for any railroad corporation, operating in this State, to charge for the transportation of any freight of any description over its road, a greater amount as toll or compensation, than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, and any railroad company violating this section shall forfeit and pay the sum of two hundred dollars for each and every offense to any one suing for the same. Nothing in this chapter shall be taken in any manner as abridging the right of any railroad company from making special contracts with shippers of large quantities of freight, to be of not less quantity or bulk than one car load." Code, § 1966.

* See *Scofield v. Ry. Co.* (48 Ohio St. 571), 54 Am. Rep. 846; also next case.

It is a wise and well-understood rule in interpreting a legislative enactment, whose terms are reasonably capable of two constructions, the one of which is, and the other is not, consistent with the fundamental and paramount law delegating or restraining the authority to enact, to adopt that construction which renders it effectual, rather than that which in whole or in part defeats its operation. *Commissioners of Granville v. Ballard*, 69 N. C. 18. This is in consonance with another rule, prescribed by the court for its own action, under which it refuses to declare a statute void, unless the invalidity of the act is, in its judgment, placed beyond a reasonable doubt; and such reasonable doubt must be solved in favor of legislative action. *King v. Railroad*, 66 N. C. 277, and numerous other cases. Under the guidance of this principle, a fair and reasonable interpretation of the statute may limit its application, not only to railroads operating within the State, but to contracts of carriage to be executed within its limits, and not to such as extend beyond them. An examination of its structure and language tends to sustain a construction thus circumscribing its provisions. It forbids "any railroad corporation operating in this State" from making the unequal charges for freight transported "over its road, or any portion of the same railroad of equal distance," etc. No reference is made to transportation beyond the State lines, under a contract of affreightment, nor does any apportionment of the one price for the entire carriage seem to be contemplated or provided for in its terms. Certainly, contracts involving inter-State commerce and traffic, are not specially embraced in its words.

It is not material to inquire in what manner different corporation carriers, who unite to form a single line, continuous in passing through different States, apportion the common fund among them; nor whether the contract is that of each, so that all are responsible for the delinquencies of others; nor whether the successive roads, retaining their several liability, co-operate as forwarding agents for the shipper at their different connecting points; since in every case the entire transportation is undertaken from the receiving to the delivery terminus of the route, for a single consideration. The essential oneness of the contract remains, and the act does not, at least in terms, touch it. If the toll or compensation be distributable among the companies upon an arrangement made by themselves, the unity of the contract with the shipper is not affected or impaired, and in no just sense can it be said that the latter is charged, under

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any agreement with him, the fractional part of the entire compensation which the domestic road receives therefrom, and to such cases the prohibitory words extend.

In this view, the acts complained of do not constitute the offense to which the penalty is affixed. But assuming the act to have a wider scope, and to embrace inter-State carriage as well, under the late decision of the Supreme Court of the United States, as yet unreported, this imputed extra-territorial effect is an invasion of the exclusive right vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Const. of U. S., art 1, § 8.

To this ruling made by the court to which is committed authority to determine conclusively the consistency of a State enactment with the Constitution and laws of the United States passed in pursuance of it, we give our adherence as a final determination of the point.

The dissenting opinion, proceeding upon the idea that the power thus conferred does not, until exercised, interfere with all State action in the premises, nevertheless concedes that when exercised the grant is exclusive. We have not seen the opinion to examine for ourselves, but such is the effect upon the information we possess.

The ruling of the court is however that State interference with inter-State commerce is absolutely forbidden, and the failure of Congress to take any action in the premises is an indication that such commerce shall remain unfettered and free, subject only to the common law. *Passenger Cases*, 7 How. 286; *Hall v. DeCuir*, 95 U. S. 485.

We do not undertake to venture upon the field traversed by the court, further than to say that the consequence of an opposite view, that permits interfering by State legislation, would be mischievous in the extreme. If one State may interfere, so may every other through which the freight is to be carried, in respect to its own chartered companies, and in succession of hostile enactments might cripple and so embarrass the roads in carrying out the contract, as almost to destroy such commerce, and deprive the country of those beneficial arrangements for transporting from distant points, so general in use, and so conducive to the Nation's prosperity and business. The former is therefore wisely committed to a single body, whose regulations may be harmonious and self-consistent.

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In either aspect of the case, the action does not lie, and must be dismissed.

Error.

Dismissed.

MERRIMON, J., does not concur in the limited operation of the statute as construed in the opinion of the court.

FREIGHT DISCRIMINATION CASES.

(96 N. C. 424.)

Statute — discrimination in railroad freights — construction.

Discrimination in freight tariffs by railway companies means charging different shippers unequal sums for carrying the same quantity equal distances.

A statute imposing a penalty on any railroad which shall charge for transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad, of equal distance, means that the compensation charged shippers for carrying an equal quantity of the same class of freight, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, at any time while its list of charges for carrying freight remains unchanged.*

ACTION for penalties. The same facts as in the last action, except that the transportation was wholly within the State. The plaintiff had judgment below.

B. H. Bunn and Jacob Battle, for plaintiff.

John L. Bridgers, A. W. Haywood and Ernest Haywood, for defendant.

MERRIMON, J. This action is brought to recover a penalty, which it is alleged the defendant has incurred by a violation of the statute (Code, § 1966), which provides that "It shall be unlawful for any railroad corporation operating in this State, to charge for the transportation of any freight of any description over its road a greater amount, as toll or compensation, than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance, and any railroad com-

* See preceding case.

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pany violating this section shall forfeit and pay the sum of two hundred dollars for each and every offense, to any person suing for the same. Nothing in this chapter shall be taken in any manner, as abridging the right of any railroad company from making special contracts with shippers of large quantities of freight, to be of not less in quantity or bulk than a car load."

The defendant contends first, that this statute is penal, and must therefore be construed strictly, and so construed, what it is conceded it did, is not forbidden by the law.

It is an old, but not very precisely defined rule of law, that penal statutes must be construed strictly. By this is meant no more than that the court in ascertaining the meaning of such a statute cannot go beyond the plain meaning of the words and phraseology employed in search for an intention not certainly implied by them. If there is no ambiguity in the words or phraseology, nothing is left to construction — their plain meaning must not be extended by inference, and when there is reasonable doubt as to their true meaning, the court will not give them such interpretation as to impose the penalty. Nor will the purpose of the statute be extended by implication so as to embrace cases not clearly within its meaning. If there be reasonable doubt arising as to whether the acts charged to have been done are within its meaning, the party of whom the penalty is demanded is entitled to the benefit of that doubt. The spirit of the rule is that of tenderness and care for the rights of individuals, and it must always be taken that penalties are imposed by the legislative authority only by clear and explicit enactments. That is, the purpose to impose the penalty must clearly appear. Such enactments, as to their words, clauses, several parts and the whole, must be construed strictly together, but as well, and as certainly in all respects, in the light of reason.

This rule however is never to be applied so strictly and unreasonably as to defeat the clear intention of the legislature. On the contrary, that intention must govern in construing penal as well as other statutes. This is a primary rule of construction, applicable in the interpretation of all statutes. The meaning of words and sentences shall not be narrowed or strained so as to exclude the meaning intended, and while the purpose of the statute shall not be extended by implication, it shall not on the other hand be narrowed so as to abridge the intention that reasonably appears from its words, phraseology and constituent parts. If words and sentences,

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and parts of sentences, having no very definite signification in their ordinary use, are employed and clearly intended to have a particular and definite meaning and application, and this appears from their particular use, connection and application in the statute, that meaning and application must be accepted as proper and controlling. If the intention to impose the penalty certainly appears, that is sufficient and it must prevail. Otherwise the legislative intent would or might be defeated by mere interpretation, which can never be allowed. Bacon Abr., tit. Stat. 9, rule 9; *United States v. Willberger*, 5 Wheat. 76; Potter Dwaris Stats. 245, and note 35, and cases there cited; *State v. Midgett*, 85 N. C. 539; *Coble v. Shoffner*, 75 N. C. 43.

Now applying the rule of construction, thus explained, to the statute above set forth, it clearly appears from its terms, its constituent parts, their bearing upon each other, and taking it as a whole, that its purpose is to prohibit and prevent each railroad corporation, doing the business of transporting freights over its railroads in this State, from charging one shipper of freights, at any time while its current list of charges for carrying freights remains unchanged, a greater amount of compensation for carrying a certain quantity of a certain class of freight a certain distance in a particular direction on its railroad, than it charges another shipper for transporting an equal quantity of the same class of freight an equal length of distance in the same direction on the same railroad, or its branches, whether the transportation for each is over the same, or a different part of the same road, and whether the freight of one shipper is carried a greater distance than that of another, with the exception, that such corporation may make special contracts without restraint, as to rates of compensation with shippers of large quantities of freight, not less than a car load. That is, to state the same differently, the compensation to be charged shippers respectively for carrying an equal quantity of the same class of freight for each, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, and although the freight of one shipper is to be transported a different and longer distance than that of the other. In such case, the charge to each must be the same for any equal distance. The statute really embodies and prescribes a scheme to prevent discrimination and secure equality and uniformity in charges for transporting freights by railroad companies doing business in this State.

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An analysis of the material parts of the statute will serve to show that its purpose is what it is thus stated to be.

1. It plainly embraces all railroad corporations, whether incorporated by the laws of this State or not, "operating," that is, doing the business of transporting freights over their respective railroads in this State. The language used is broad and comprehensive — in no sense that can reasonably be attributed to it, does it imply exception or limitation. The word "any" is used in the sense of each, every and all. There is nothing in the statute, its terms, nature or purpose, that suggests that it does not embrace every and all such corporations. Nor is there any thing in the nature of a foreign railroad corporation doing such business in this State that gives it any legal advantage or immunity in any such respect. When it comes into this State to do business, it at once voluntarily becomes subject to its laws regulating the business of transportation on railroads. Although it may not be the absolute owner of the railroad it uses, except as lessee, it is the temporary owner for the purposes of its business, and answerable as the owner in that respect.

And as to a railroad corporation created by and under the laws of this and an adjoining and other States, it is completely subject to the laws of this State, except as otherwise expressly provided in its charter, because it is a corporation of this State, and within its jurisdiction and control, just as are all other corporations created by its authority, subject to the limitation mentioned.

2. The clause, "to charge for the transportation of any freight," etc., implies to settle, require or demand of the shipper, as of right, certain compensation for the transportation of any freight already transported, or delivered to the corporation to be transported. As to this, the penalty is incurred when the charge is certainly made against the shipper, in the case provided against by the statute. It cannot be that the compensation charged must first be paid, because it is made unlawful "to charge" otherwise than is allowed. This does not, in any ordinary sense, imply to receive the compensation, and there is nothing that in terms or by just implication goes to show that any such meaning was intended. The purpose is to give the penalty at once upon making the charge and thus the more certainly to prevent the evil intended to be suppressed, and a violation of the statute.

3. The phrase "a greater amount as toll or compensation," etc., obviously means to charge one shipper of a certain class of freight

over its road, in a particular direction, greater compensation than is charged to another shipper of "an equal quantity of the same class of freight, transported in the same direction, over any portion of same railroad of equal distance," not necessarily over the same distance, but any equal distance. The words "greater amount," "an equal quantity," "in the same direction," and "of equal distance," and "over any portion of one railroad of equal distance," are employed to fix and establish the basis of the equality of the charge allowed to be made. This equality of charge is not limited to the same, but to an "equal quantity," not to the same but to an "equal distance," over any part of the same road. These provisions are significant and important, and must receive such interpretation as their use and meaning may allow, and as will give the statute intelligent practical effect.

It would be comparatively seldom that two shippers would ship precisely the same quantity of the same class of freight; and the number of instances in which two shippers would ship exactly the same quantity of freight of the same class from and to the same places would be very small indeed, as compared with the vast number of shipments that would generally be made from the same place to a large and indefinite number of other places. The words employed in themselves do not imply such a restricted meaning, and this must not be narrowed so as to defeat the purpose of the statute, reasonably appearing. It will be observed that there is an absence of any provision in the statute in this connection, or at all, that "equal distance" shall apply to cases where the freight of two shippers is shipped from and to the same place, and this omission seems to have been intentional, because the express provision is "over any portion of the same railroad of equal distance." If equal, thus used, means the same distance, then why are the words "over any portion," used? In that case they would be unnecessary, mere surplusage and meaningless. This cannot be allowed in order to give the statute the narrow and unreasonable effect just pointed out.

The statute does not, in terms or by reasonable implication, authorize such corporations to graduate their charges of compensation for carrying freights by the different lengths of distance the same are to be transported. Indeed the purpose is to prevent that very thing, and to establish the rule of equality of charges among shippers of the same class of freights for all "equal distances,"

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although the freight of one may be carried further than that of the other. For the equal distance the charge must be the same, and the same as that charged to any shipper over any part of the same road.

It is expressly made unlawful, in the cases provided for in the statute, to charge one of two shippers of freight greater compensation than another, and there is no exception or distinction made or allowed in this respect, upon the ground that the freight of one of two shippers is to be carried a greater distance than that of another. The end to be secured is to make the compensation, to the extent of the "equal distance" the same, and not greater as to one shipper than another, although the freight of one of them is carried a greater distance than the equal distance. Hence if such a corporation should transport for one shipper a certain quantity of freight of a particular class in one direction one hundred miles over its road for \$10, and it should charge another shipper of an equal quantity of the same class of freight in the same direction, at the same time, fifty miles, \$10, it would charge the latter just double the amount of compensation it charged the former for the equal distance of fifty miles. The presumption would be in that case that the charge was made for the whole distance the freight was carried for each shipper, because in the order of business the corporation would not carry freight to the end of fifty miles, the equal distance, for compensation, and beyond that for nothing! It is not sufficient to say that the corporation would have carried the freight, that stopped at the end of fifty miles, one hundred miles for the same price, because the shipper for the shorter distance had the right to be charged only a sum of money equal in amount to that charged to the shipper for the longer distance "over any portion of same railroad of equal distance." The statute so expressly provides. "Equal distance" clearly means an "equal distance" anywhere in the same direction over the same road, without reference to the greater distance than the "equal distance" the freight of one of two shippers may be carried. It would certainly be most unreasonable, and trifling with a serious matter, to conclude that the legislature intended simply to make it unlawful and penal for railroad corporations to charge in the case provided for, and against one shipper of freight, a greater compensation for transporting the same than another, only where both ship from and to the same points. Neither the terms nor the reason of the

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statute warrant, much less do they require, so narrow an interpretation. Thus construed it would be a ridiculous mockery !

4. In the nature of the business of transporting freights railroad corporations must classify such freights and the charges for carrying the same, and such classifications, when established, are observed in the course of business until for some reason they are changed or modified. Besides the statute (Code, § 1965), which is a part of that now under consideration, requires each of such corporations "to keep a list of the charges for carrying freight, specifying name of place, class of freight and charge for carrying same," posted in a conspicuous place in the depots or places where freights are received for such shipment, and such charges cannot be increased without giving fifteen days' notice. The presumption is that such corporations obey the law and make and observe the lists of charges thus required to be made while they continue current and unchanged.

The clause, "shall at the same time be charged, etc.," must be construed in connection with the usage and statutory provision just mentioned, and so interpreted it embraces the period of time while such lists continue unchanged and current. The words "same time" are used in the sense of the same period, same occasion, while the lists continue current. If they be taken literally, in their narrowest sense, as they appear in the statute, its operation would be confined within a very narrow compass. It would be very seldom indeed that two shippers of freight would ship precisely equal quantities of the same class, in the same direction, over the same road at the very same time. In view of the other provisions of the statute and its purpose and to give it practical effect, the interpretation thus given must be the necessary and true one.

5. As we have already seen, the clause, "an equal quantity of the same class of freight," etc., is intended to designate the quantity that fixes the equality and uniformity of compensation that may be charged. Thus if one ship ten bales of cotton and another five bales, although the former ships more than the latter, the compensation charged to each for transporting five bales must be equal, whether that be much or little, and the shipper who has more than five bales must, as to the excess, be charged the same rate of compensation as that charged each for the equal quantities. This is necessary to preserve the equality of charges.

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6. The words, "transported in the same direction," etc., plainly imply in the direction the freights are carried over the railroad from the depot, or the place where the shipments were made, and this embraces branches of the same road in that direction, if these are used in connection with, and as part of the same road. If the corporation should use two or more distinct railroads, not in connection, it may be that it could have a different and distinct class of charges for each of its roads.

7. The clause "over any portion of same railroad," etc., is likewise, as already explained, intended to secure equality and uniformity of charges, and to exclude the conclusion that "equal distance" implies the same distance.

The exception in the statute, allowing railroad companies to make "special contracts" with shippers "of large quantities of freight, to be of not less in quantity or bulk than one car load," tends strongly to show the correctness of the construction we have given it. If the words and clauses are to be taken in the literal and very narrow sense contended for by the counsel for the defendant, then of what use is the exception? Accepting their interpretation the defendant could, as to all shipments, discriminate at its pleasure in its charges of compensation, except where two or more shippers happen to ship precisely equal quantities of the same class of freight, going precisely equal distances in the same direction, and from and to the same places. Such cases would seldom, if ever, occur, and the statute so construed, would be practically inoperative. It would suppress no evil. The obvious purpose of the exception is to except large shipments of freights from the stringency of the statute. It can have no other practical meaning.

In aid of the general purpose of the statute, above indicated, the legislature passed a subsequent statute (Acts 1879, ch. 237; Code, § 1968), forbidding railroad companies "to pool freights, or to allow rebates on freights," the object being to prevent unreasonable competition between two or more railroad companies at "competing points," and to prevent discrimination as to compensation for carrying freights by means of "rebates."

The title of the statute harmonizes with its terms and constituent parts, and plainly designates its purpose, and this strengthens the interpretation given above. In Acts of 1874-'75, chap. 240, it is entitled "An Act to prevent discrimination in freight tariffs by railroad companies operating in this State;" and as brought for-

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ward in the Code, chap. 49, entitled "Railroads," § 1966, it is placed immediately under the title, "Discrimination in freight unlawful," etc.

"Discrimination in freight tariff by railroad companies," "discrimination in freights," and like expressions, as applied to such companies, are terms and phrases well understood in the nomenclature of transportation over railroads. They may have a wider signification, but for the present purpose they certainly imply to charge shippers of freight, as compensation for carrying the same over railroads, unequal sums of money for the same quantity of freight, for equal distances; more for a shorter than a longer distance; more in proportion of distance for a shorter than a longer distance; more for freights called "local freights," than those designated "through freights;" more for the former, in proportion of the distance such freights may be carried, than the latter, the railroad companies being prompted to make such unequal charges by unreasonable competition between two or more of them at competing points, more or less important, and to make unreasonably high charges at other places where there is the absence of competition, because they have power to make them, and exact payment in order to make unjust gain and as well to help pay the cost of such unnatural competition.

Nor in this connection is it improper to notice the public fact, that at the time the statute under consideration was enacted, there was a general complaint as to the alleged grievance that such unequal and oppressive charges were made by railroad companies in this State, greatly to the public prejudice. The statute, its terms and various parts, including its title, alike point to such evil, and provide for its suppression.

The purpose thus attributed to the statute clearly appears from its terms, its constituent parts, their bearing upon each other, and the whole taken together. If there could be any doubt as to its true meaning, its title may be resorted to, to strengthen the conclusion reached, especially as it does not in any respect contravene, but on the contrary harmonizes with the provisions of the statute, and points in broad and comprehensive terms to the mischief to be remedied. *State v. Matthews*, 3 Jones, 457; *United States v. Fisher*, 2 Cr. 386; *Hadden v. Collector*, 5 Wall. 107; *Potter's Dwar. Stats.* 102 and n. 4; *United States v. Railroad*, 91 U. S. 72; *Platt v. Railroad*, 99 U. S. 48.

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On the argument, one of the counsel for the appellant, pointed out with much force the possible evil consequences of such an interpretation of the statute to the defendant, shippers of freight, and the public generally. This argument would have force if the legislative intent were doubtful, but when this unmistakably appears, as it certainly does here, it must prevail.

Such an argument might well be addressed to the legislature. If the statute is too severe and impracticable, the remedy lies in legislative action. It is not the province of the courts to determine the wisdom and expediency of statutes, and what they should or should not be, but what they are, and to apply them as occasion may require.

It appears, that according to its current list of charges for carrying freight, the defendant charged for carrying fertilizers from Wilmington in this State, to Rocky Mount in this State, over its railroad, a distance of one hundred and thirty-seven miles, \$2.50 per ton, and at the same time, the same amount, for carrying a ton of the same class of freight, from the same place, in the same direction, over the same part of its railroad, an equal distance, and thence over its branch road to Tarboro in this State, the greater distance of eighteen miles; and that it carried for the plaintiffs from Wilmington to Rocky Mount, ten tons of fertilizers, and charged them for carrying the same, \$25, and at the same time, it carried for R. H. Battle, from the same place, over its same railroad, in the same direction, to Tarboro, the greater distance of eighteen miles, seventeen tons of fertilizers, of the same class of freight, and charged him \$42.50. To simplify this statement, the defendant charged the plaintiffs \$2.50, for carrying a ton of fertilizers one hundred and thirty-seven miles, over its road, and at the same time charged R. H. Battle but the same amount, as compensation for carrying a like ton of fertilizers, in the same direction, over its same railroad, a greater distance, to-wit, one hundred and fifty-five miles. In the orderly course of business, this latter charge was for the whole distance, and not simply for a part of it ending at Rocky Mount. The presumption is, nothing to the contrary appearing, that the charge was for the whole distance. Hence it must be that the defendant charged the plaintiff a greater amount as compensation for carrying their ton of fertilizers, for the distance of one hundred and thirty-seven miles of its railroad, than it did at the same time charge R. H. Battle, for carrying an equal quantity

of the same class of freight in the same direction and equal, in this case the same distance, over its same railroad ; and so also the defendant charged the plaintiff for carrying ten tons of fertilizers one hundred and thirty-seven miles over its railroad, \$25 as compensation, and at the same time charged another shipper, R. H. Battle, a less amount for carrying an equal quantity of the same class of freight, an equal distance, and in this case the same distance, in the same direction, over its same railroad. We have already seen that the fact that the defendant carried for one of these two shippers, at the same time, more than ten tons, cannot affect the result. They had equal quantities to the extent of ten tons, and for these equal quantities it charged one of them a greater amount as compensation than the other for an equal distance, and this is the material fact in this respect and connection. The defendant therefore incurred the penalty sued for in this action, unless another defense relied on by it must be sustained as good and available.

The defendant contends, secondly, that its charter embodies a contract, founded in several material respects, upon valuable considerations, between it and the State of North Carolina, and that among the stipulations contained in it is that allowing the defendant to make by-laws and regulations for its government, not inconsistent with the laws of this State and the United States, and also the following : "and they (the defendants), shall be entitled to receive and demand the following rates, to-wit, not exceeding four cents a mile for toll, and nine cents a mile for transportation per ton of 2,000 pounds ; and for the transportation of passengers, not exceeding six cents per mile for each passenger."

It further insists, that if the statute under consideration is intended to embrace it, then as to it, the statute is inoperative and void, because it impairs the obligation of the contract, the material clause of which is set forth above.

It is not necessary to decide whether or not the clause of the charter of the defendant, just quoted, is, and must be treated as such a contract on the part of the State, as prevents it, in the exercise of legislative power and authority, from regulating and establishing the charges of compensation of the defendant for carrying freights and passengers over its railroad, because the statute under consideration does not undertake to abridge or interfere with the rights of the defendant to charge any amount as such compensation as it may see fit, within the maximum of charges prescribed and

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allowed in its charter. As said above, that statute does not provide a maximum or minimum, or any charge, or schedule of charges as compensation for carrying freights. It simply requires equality and uniformity in such charges and forbids the contrary under a penalty.

The charter of the defendant does not in terms, or by necessary or just implication, provide that it may charge one shipper for carrying his freight of a particular class one price, and another shipper a different and greater price, for the like and equal service with or without regard to the quantity of freight, or the distance it may be carried. On the contrary, the reasonable implication is, that its charge shall be equal, in proportion, against all shippers alike, as to quantity and distance. The defendant is authorized, in terms, to charge as compensation for carrying freights, not exceeding a fixed price per ton per mile. This seems to contemplate uniformity and equality per ton per mile, extended to all shippers of freight, whatever may be the price fixed by the defendant. This is just, and comports with equal fairness to all shippers, although it may not always suit the better convenience and advantage of the defendant. Moreover the defendant exercises franchises and privileges granted by the legislature for the common public good. Besides the purpose of the State to abandon or part with its right and power to require the defendant to make its charges for carrying freights equal and uniform as to quantity and distance to all shippers alike, is not to be presumed, nor can it appear from mere inference. Such purpose must be deliberate, and appear clearly from positive terms, express grant, or necessary implication.

It is difficult to understand how, upon principle, the legislature can, by contract or otherwise, effectually grant, sell, or part with, to any extent, any part of an essential power of government. If this can be done at all, it can only be done by a clearly expressed purpose to do so. The presumption is against such purpose. This rule of interpretation is elementary and important, and should always be strictly observed.

The legislature, for public consideration, granted to the defendant the right to fix within a maximum its compensation for carrying freights, but this is a very different thing from the right to discriminate for any purpose or consideration, in any way or in any respect, as to compensation for carrying freight. There is no provision in the defendant's charter, that in terms or by necessary im-

plication declares the purpose on the part of the legislature to conclude the State against its exercise of the right and power to forbid and prevent such discrimination.

The defendant assigned as error the refusal of the court to grant its motion to dismiss the action, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court properly refused to grant the motion. The material facts were agreed upon in writing and submitted to the court for its judgment, and thus they passed into the record, and the judgment was founded upon these. Moreover it was agreed by the parties that the court should make an order allowing the plaintiffs to amend their complaint, so as to make it conform to the facts agreed upon.

The amendment, it seems, was not made. This may be done here for the sake of uniformity and order.

There is no error and the judgment must be affirmed.

Judgment affirmed.

SMITH, C. J. While I concur in the construction of the statute which covers the facts presented in this case, and subjects the defendant to the penalty imposed, I am not prepared to assent to all that is said about its operation, in the wide, elaborate and discursive range taken in the discussion in the opinion, upon an assumed state of facts not before the court. Our office is to construe and apply the statute to the case made in the complaint, and thus far our ruling becomes a decision, having the force and effect of a precedent.

It is prudent and safe in most cases not to go further; not to indulge in the utterance of opinions hypothetical and speculative only, which though not authoritative adjudications, may embarrass in the impartial and free examination of cases that may thereafter come before the court and require a direct judgment. Especially, in my opinion, ought this rule to be observed in the interpretation of a legislative act, not very clear in its terms or the expression of its purposes.

Literally and rigorously interpreted the inhibition is confined to unequal and discriminating charges for compensation in carrying "an equal quantity of the same class of freight, transported in the same direction on any portion of the same railroad of equal distance," and the penalty is incurred when these conditions co-exist in the corporate act.

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If this absolute strictness of construction is to be put upon the act, obviously a case would seldom occur, in which its provisions would be violated, for its force could be expended in preventing personal discrimination among freighters or shippers. This is too narrow an interpretation and would not only fail to express and give effect to the legislative will in remedying a felt evil, detrimental to its citizens, but be to practically annul and render the act inoperative for any useful purpose.

The first duty of the court is to ascertain the intent of the act, as deducible from the terms in which it is expressed, and the evil it was designed to remedy and remove.

I agree in the opinion of the court that it embraces the facts of the case before us, and the mandate is disregarded in requiring the same compensation for the carriage over the longer and the shorter route. The fact that there is no increased charge for the additional transportation, beyond that part of the road traversed in common, lessens, *pro tanto*, the compensation or toll exacted from him whose freight is carried further, and discriminates unequally between the parties. The charge is not the same to each for transportation over an equal, the same, distance on the road.

But I go no further, reserving to myself the right to examine, with full freedom, cases that may hereafter arise, and come before the court, and decide upon the applicability of the statute to them.

No error.

Judgment affirmed.

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(95 N. C. 582.)

Taxation — constitutional law — drummers.

A State statute imposing a license tax on drummers, and allowing drummers paying a dealer's tax an equal rebate on their purchase tax, is not unconstitutional. (*See note, p. 267.*)

CONVICTION of violation of license taxation. The opinion states the point.

Attorney-General and Charles M. Busbee, for State.

John Devereux, Jr., for defendant.

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SMITH, C. J. We have had occasion recently to consider the section on which the present indictment is founded, and to define the class of persons intended to be taxed as drummers, a word which seems to have come into general use, in *State v. Miller*, 93 N. C. 511; s. c., 53 Am. Rep. 469, and we do not propose to renew the discussion.

While to this enactment, separately considered, no objection is made for its want of uniformity to, or its inconsistency with, the Federal Constitution, it is insisted that this conflict is brought about by a rebate authorized in section 25 preceding. This section imposes upon merchants, and other dealers in goods, wares and merchandise, besides an *ad valorem* tax and stock, a further license tax of one-tenth of one per centum on the total amount of purchases, estimated semi-annually upon the aggregate of such for the preceding six months, and contains this clause: "Dealers paying a drummer's tax, prescribed in section twenty-eight of this act, shall be allowed a rebate of that amount on his [their] purchase tax for the same time."

As merchants residing out of the State, and sending their travelling agents into the State, can have no rebate unless they have here a business liable to the purchase tax, it is insisted that this is a discrimination against non-resident merchants unwarranted by the Constitution of the United States, and is the same as if the drummer's tax was put upon one class and not upon the other.

There is no feature in the statute that distinguishes between resident and non-resident itinerant salesmen or between their employees. Both must pay the same privilege tax and enjoy equal advantages under the license issued. Nor is any difference made in respect to the place of product or manufacture of the goods to be sold. The rebating provision applies to all who pay the purchase tax from which the deduction is to be made. The non-resident may have a stationary mercantile business in the State, conducted by himself or an agent, and he is equally entitled to the rebate upon the same tax. Under the law, he stands upon the same footing, with equal right to the same exemption, as the home merchant. If the benefit does not come to him, it is because he has not the tax to pay from which the reduction comes. As was forcibly argued for the State, he possesses all the immunities and privileges that belong to a citizen, and such are protected by the

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fundamental national law against an invasion by State legislation, and no more can be claimed.

In truth, the disadvantage is with the resident dealer, who is compelled to pay a tax from which the principal of the non-resident drummer or himself, non-resident, is exempt.

The refunding puts them more on equal ground. Certainly there is no forbidden discrimination in the legislation itself, and hence it is sought to be found in the practical operation of the law. This is not always however a test of the validity of a statute.

A discriminating license tax on commission merchants dealing in cotton or cane sugar, levied in a northern State, would operate injuriously upon those States where these articles were raised, but this would not render the tax obnoxious to constitutional objections, since in the terms the discrimination is not seen. Undoubtedly a State, where permitted by its own Constitution, may levy taxes upon professions and privileges, and when uniform in assessment, and in authorized rebates, the legislation cannot be deemed discriminating against citizens of other States or their property introduced for the purpose of sale, when precisely the same burden rests upon our own.

The cases to which we have been referred in the argument of defendant's counsel (*Passenger Cases*, 7 How. 283; *Woodruff v. Parham*, 8 Wall. 123; *Ward v. Maryland*, 12 Wall. 418) are not hostile to the views expressed. The first two relate to attempts to impose taxes upon imports from foreign States and from a State in the Union, which are held to interfere with the exclusive right given to Congress "to regulate commerce with foreign nations and among the several States," and denying to a State the right to "levy any imports or duties on imports or exports" without the consent of congress, except in the enforcement of its inspection laws. Art. 1, §§ 8 and 9.

The Maryland enactment was declared void, because it imposed a higher license tax upon agents or drummers not permanently residing in the State, than upon its own residents embarking in the same business, and also discriminated against their selling, unless they paid the increased tax, any goods, wares or merchandise other than agricultural products and articles manufactured in that State.

Delivering the opinion, Mr. Justice CLIFFORD, conceding the power of a State to impose taxes on all sales made within its limits, whether the goods sold are the produce of that or some other State,

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provided the tax is uniform, proceeds to say: "That a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid."

In *Machine Co. v. Gage*, 100 U. S. 676, cited in the brief of counsel representing the State, Mr. Justice SWAYNE collects and discusses numerous cases in which State legislation has been decided to invade the exclusive power vested in Congress to regulate inter-State commerce, by discriminating between citizens of that and of other States, or in goods of their growth and manufacture introduced in the legislating State.

In this case the act, whose validity was called in question, imposed a tax of \$10, subsequently raised to \$15, upon "all peddlers of sewing machines and selling by sample." The sewing machines charged with the tax were made in Connecticut, and the Supreme Court of Tennessee gave an authoritative construction of the act as "taxing the peddlers of such machines without regard to the place of growth or of manufacture." Accepting this as the correct construction of the act, the court, Mr. Justice SWAYNE delivering the opinion, after a full review of the adjudications, declares that "the statute in question, as construed by the Supreme Court of the State, makes no such discrimination" (referring to a discrimination in favor of the State or of the citizens of the State which enacted the law mentioned in a preceding clause). "It applies alike to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing as to the tax complained of, had an unquestionable right to impose the burden."

The ruling in the recent case of *Walling v. Michigan*, 116 U. S. 446, indirectly recognizes the principle upon which the preceding adjudication rests in declaring void a statute of Michigan, set out in full in the case, but which in effect imposed a tax upon persons who not residing or having their principal place of business within the State engage there in the business of selling or soliciting the sale of intoxicating liquors, to be shipped into the State from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State. This is deemed a restraint upon commerce, and the obnoxious features were not removed by a subsequent act, im-

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posing a greater tax upon all persons in the State engaged in manufacturing or selling such liquors therein.

The court declares this to be "a discriminating tax, levied against persons for selling goods brought into the State from other States or countries," and to be clearly within the ruling in *Welton v. Missouri*, 91 U. S. 275. No such vitiating element is to be found in our enactment, nor can we perceive wherein consists the alleged repugnancy to the Federal Constitution, or any discrimination unfavorable to the non-resident, or any advantage secured to the home dealer and denied to the other.

The general assembly seems to have aimed to eliminate from the revenue law the objectionable and discriminating provisions that were present in its earlier enactments, in order to conform its legislation to the requirements of the paramount law of the United States Constitution as authoritatively interpreted by its highest court. But if such inconsistency, discoverable not in form of the enactment, but from its unequal operation, find a reasonable support in argument, which we do not concede, it is not so apparent as to warrant us in declaring it inoperative and void.

There is no error, and this will be certified for further action in the court below.

No error.

Judgment affirmed.

NOTE BY THE REPORTER.— In *Robbins v. Taxing District of Shelby County, Tennessee*, Sup. Ct., U. S., March 7, 1887, it was held that a tax upon drummers, and all persons not having a regular licensed house of business in the taxing district, selling goods by sample, is void. The text of the opinion follows:

"BRADLEY, J. This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the city of Memphis, in the State of Tennessee, in soliciting the sale of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the State of Ohio, dealers in paper and other articles of stationery, and exhibited samples for the purpose of effecting such sales, an employment usually denominated as that of a 'drummer.' There was in force at that time a statute of Tennessee relating to the subject of taxation in the taxing districts of the State, applicable however only to the taxing district of Shelby county (formerly the city of Memphis), by which it was enacted, amongst other things, that 'all drummers and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares or merchandise therein, by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege; and no license shall be issued for a longer period than three months.' Act of 1881, chap. 69, § 16.

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"The business of selling by sample and nearly sixty other occupations had been by law declared to be privileges, and were taxed as such, and it was made a misdemeanor, punishable by a fine of not less than \$5 nor more than \$50 to exercise any of such occupations without having first paid the tax or obtained the license required therefor.

"Under this law Robbins who had not paid the tax nor taken a license, was prosecuted, convicted, and sentenced to pay a fine of \$10, together with the State and county tax, and costs; and on appeal to the Supreme Court of the State, the judgment was affirmed. This writ of error is brought to review the judgment of the Supreme Court, on the ground that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several States.

"On the trial of the cause in the inferior court, a jury being waived, the following agreed statement of facts was submitted to the court, to-wit:

"Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of —, 1884, was engaged in the business of drumming in the taxing district of Shelby county, Tenn.—*i. e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials and such articles as are used in the book stores of the taxing district of Shelby county, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest.'

"This was all the evidence, and thereupon the court rendered judgment against the defendant, to which he excepted, and a bill of exceptions was taken.

"The principal question argued before the Supreme Court of Tennessee was as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

"That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not at this day require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

"1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of

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regulation. This was decided in the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319, and was virtually involved in the case of *Gibbons v. Ogden*, 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others, in *Brown v. Maryland*, 12 Wheat. 419; *The Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35, 42; *Ward v. Maryland*, 12 Wall. 418, 480; *State Freight Tax Cases*, 15 Wall. 282, 279; *Henderson v. Mayor of New York*, 92 U. S. 259, 272; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 208; *Wabash R. Co. v. Illinois*, 118 U. S. 557.

"2. Another established doctrine of this court is that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will, and the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice JOHNSON in *Gibbons v. Ogden*, 9 Wheat. 1, 222, by Mr. Justice GRIER in the *Passenger Cases*, 7 How. 283, 462; and has been affirmed in subsequent cases. *State Freight Tax Cases*, 15 Wall. 282, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *County of Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston*, 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 455; *Pickard v. Pullman Palace Car Co.*, 117 U. S. 84; *Wabash R. Co. v. Illinois*, 118 U. S. 557.

"3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when by virtue of its police power and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or inter-State commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with inter-State or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting inter-State commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

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"For authorities on this last head it is only necessary to refer to those already cited.

"In a word, it may be said that in the matter of inter-State commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

"In view of these fundamental principles which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of inter-State trade? How is a manufacturer or a merchant of one State to sell his goods in another State, without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may undoubtedly be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may perhaps safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles, which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every State with which he might desire to trade. Surely he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this a matter of convenience and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kinds of business, and would be entirely unsuited to many branches of business. In these cases then what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

"The only other way, and the one perhaps which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon inter-State commerce, is to speak at least unadvisedly and without due attention to the truth of things.

"It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose

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however that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides why could not the State to which his letters might be sent tax him for soliciting orders in this way as well as in any other way?

"The truth is that in numberless instances the most feasible, if not the only practicable way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

"But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent, but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of inter-State commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the State legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on inter-State commerce? It seems to be forgotten in argument that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

"To deny to the State the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources or its just power of taxation. It is very true that if the goods when sold were in the State, and part of its general mass of property, they would be liable to taxation, but when brought into the State in consequence of the sale they will be equally liable, so that in the end the State will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the

State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown v. Houston*, 114 U. S. 623. When goods are sent from one State to another for sale, or in consequence of a sale, they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown v. Houston*, *qua supra*; *Machine Co. v. Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on inter-State commerce itself.

“It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Inter-State commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the *State Freight Cases*, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is inter-State commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in one case it is an act of foreign, and in the other of inter-State commerce, both of which are subject to regulation by Congress alone.

“It would not be difficult however to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples, whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true, but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon inter-State commerce, but that it is intended to have that effect as one of its principal objects. And if a State can in this way impose restrictions upon inter-State commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

“If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interests of that State, Congress, if applied

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to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation.

"To say that the tax, if invalid as against drummers from other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the State is not bound to tax its own drummers; and if it does so, whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal commerce, but that does not give it any right to tax inter-State commerce.

"The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error must be discharged."

WAITE, C. J., *dissenting*, said: "I am unable to agree to this judgment. The case, as I understand it, is this: In January, 1879, the State of Tennessee abolished the charter of the city of Memphis and created the taxing district of Shelby county as its successor. By a statute passed April 4, 1881, to provide means for the support of the taxing district, it was, among other things, enacted 'that all drummers and all persons not having a licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustees the sum of ten dollars per week, or twenty-five dollars per month, for such privilege, and no license shall be issued for a longer period than three months.'

"Sabine Robbins, a citizen of Ohio, employed by the firm of Rose, Robbins & Co., also citizens of Ohio, engaged in business as merchants at the city of Cincinnati, in that State, has been convicted of a violation of this statute, because he solicited trade for his firm in the taxing district, by the use of samples, without a license. This it is now decided was wrong, because the statute under which the conviction was had, in so far as it applies to the business in which Robbins was engaged, is a regulation of inter-State commerce, and therefore repugnant to the commerce clause of the Constitution of the United States. To this I cannot give my assent.

"The license fee is demanded for the privilege of selling goods by sample within the taxing district. The fee is exacted from all alike who do that kind of business, unless they have 'a licensed house of business' in the district. There is no discrimination between citizens of the State and citizens of other States. The tax is upon the business, and this I have always understood to be lawful, whether the business was carried on by a citizen of the State under whose authority the exaction was made, or a citizen of another State, unless there was a discrimination against citizens of other States.

"In *Osborne v. Mobile*, 16 Wall. 481, it is said 'the whole court agreed that a tax on business carried on within the State, and without discrimination between its citizens and the citizens of other States, might be constitutionally

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imposed and collected.' And I cannot believe that if Robbins had opened an office for his business within the taxing district, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals. But what can be the difference in principle, so far as this question is concerned, whether he takes a room permanently in a business block of the district, where when he comes he sends his boxes and exhibits his wares, or engages a room temporarily at a hotel or private house, and carries on his business there during his stay? Or even whether he takes his sample boxes around with him to his different customers, and shows his wares from them? In either case he goes to the district to ply his trade and make his sales from the goods he exhibits. He does not sell those goods, but he sells others like them. It is true that his business was to solicit orders for his principals, but in doing so he bargained for them, carried on business for them in the district by means of the samples of their goods, which had been furnished him for that purpose. To all intents and purposes he had his goods with him for sale, for what he sold was like what he exhibited as the subjects of sale. I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler, and yet I can hardly believe it would be contended that the provision of the same statute now in question, which fixes a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who came with their goods from another State and expected to go back again.

"As the law is valid so far as the inhabitants of the State are concerned, no inhabitant can engage in this business unless he pays the tax. If citizens of other States cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee, and in favor of those of other States. This could never have been intended by the legislature, and I cannot believe the Constitution of the United States makes such a thing necessary. The Constitution gives the citizens of each State all the privileges and immunities of citizens in the several States, but this certainly does not guarantee to those who are doing business in States other than their own immunities from taxation on that business to which citizens of the State where the business is carried on are subjected.

"This case shows the need of such authority in the States. This taxing district is situated on the western boundary of Tennessee. To get into another State it is only necessary to cross the Mississippi river to Arkansas. It may be said to be an historical fact that the charter of Memphis was abolished and the taxing district established because of the oppressive debt of Memphis, and the records of this court furnish abundant evidence of the heavy taxation to which property and business within the limits of both the old corporation and the new have been for many years necessarily subjected. Merchants in Tennessee are by law required to pay taxes on the amount of their stock on hand, and a privilege tax besides. Under these circumstances it is easy to see that if a merchant from another State could carry on a business in the district by sending his agents there with samples of his goods to secure orders for deliveries from his stock at home, he would enjoy a privilege of exemption from taxation which the local merchant would not have unless in some form

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he could be subjected to taxation for what he did in the locality. The same would be true in respect to all inhabitants of the State who were sellers by sample in this district, but who had no place of business there. And so they, like citizens of other States, were required to pay for the privilege. Thus all were treated alike, whether they were citizens of Tennessee or of some other State, and under these circumstances I can see no constitutional objection to such a taxation of citizens of the other States for their business in the district.

"I have treated the case as a conviction of a 'drummer' for selling goods by sample. That is what Robbins was found guilty of, and that is what this statute makes an offense. The license is only required of 'drummers and all persons not having a licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample.' The Supreme Court of Tennessee decided that this means nothing more than that any person who sells by sample shall pay the tax, and to that I agree. It will be time enough to consider whether a non-resident can be taxed for merely soliciting orders without having samples when such a case arises. That is not this case.

"Mr. Justice FIELD and Mr. Justice GRAY concur in this dissent."

In *Ex parte Asher*, Court of Appeals of Texas, June 15, 1887 (see 86 Alb. L. J. 21), it was held that the act of the seventeenth legislature of this State, imposing an occupation tax upon commercial travellers, "drummers," or solicitors of trade selling by sample, is constitutional. The court said:

"It is urgently contended that this statute is in conflict with article 1, § 8, subd. 8, Const. U. S., which declares that Congress shall have the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes,' and we are most confidently cited by counsel for applicant, in support of this position, to the case of *Robbins v. Taxing District Shelby Co.* (recently decided by the Supreme Court of the United States, March 7, 1887), in which it was, in substance, held that 'a statute imposing a license tax upon drummers and others selling by sample within a certain taxing district is a regulation of inter-State commerce, and therefore unconstitutional as applied to citizens of other States.'

"We are free to admit that a majority of the court, in that case, so held the law to be. We are free to admit that if the decision of the majority be correct, it settles the law of this case in favor of the position assumed for applicant. We are further free to admit that in all cases involving clearly and unquestionably the constitutionality and validity of State laws with reference to provisions of the Constitution of the United States, the decisions of the Supreme Court of the United States, clearly, certainly and unequivocally expressed upon those questions, should and ought to be binding upon the State courts, because we fully recognize that 'it is essential to the protection of the national jurisdiction, and to prevent collision between the State and national authority, that the final decision upon all questions arising in regard thereto should rest with the courts of the Union.' Cooley Const. Lim. (5th ed.) 16. But such decisions, no more than the decisions of the State courts, are or should be binding upon the latter, if in themselves unwarranted assumptions of constitutional authority, invocations of the Federal power, where such

power does not and was never intended to apply and operate; and moreover where said decisions are directly in conflict with well-adjudicated cases of the same court, which are not overruled, and which in addition to their equal authority are based upon fundamental and eternal principles of reason, justice, and right.

"We do not propose to enter upon a discussion anew of the delicate and important question of inter-State commerce,—a question so often and so ably discussed in the debates upon the adoption of the Federal Constitution, when the patent defects of the articles of confederation, intended to be corrected, were directly present in the minds and experience of the framers of that instrument, a question so often discussed, much more ably than we could possibly hope to do, in the many adjudicated cases which have come under judicial investigation in the Supreme, Circuit and District Courts of the United States, and courts of last resort in the various States of the Union, as well as in standard elementary treatises of recognized authority. On the contrary, we shall content ourselves with simply stating certain elementary principles of government involving the questions, and then cite the authorities bearing directly upon the issue presented in this case.

"Mr. Cooley, in his work on the Law of Taxation, says: 'The Federal Constitution also provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. The Constitution, and the laws made in pursuance thereof, being supreme over the several States, the power of the regulation cannot be interfered with, limited, or restrained by any exercise of State authority. When therefore it is held that the power to tax is at the discretion of the authority which wields it, a power which may be carried to the extent of an annihilation of that which it taxes, and therefore may defeat and nullify any authority which may elsewhere exist for the purpose of protection and preservation, it follows as a corollary that the several States cannot tax the commerce which is regulated under the supremacy of Congress. But a tax on property that may be the subject of commerce under congressional regulation is not a tax on commerce.' Page 62. As to the general power of taxation of business, the learned author says: 'Government may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction; or on the other hand, it may select any species of property, and tax that only. The same is true of occupations — government may tax one, or it may tax all. There is no restriction upon its power in this regard, unless one expressly imposed by the Constitution.' Id. 384. Again, he says: 'A tax on the privilege of following any particular employment is usually confined to those which in some particular are exceptional, either because supposed to be especially profitable, or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a general demand; so that the burden imposed will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. The necessities of the government may require that the lowest employment, as well as the most lucrative, shall contribute to its support; and if any is exempted, motives of policy will govern the discrimination. When the tax takes the form of a tax on the priv-

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illegality of following an employment, convenience in collecting will commonly dictate the requirement of a license; and the person taxed will be compelled to pay the taxes as a condition to the right to carry on the business at all. In such a case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it.' Id. 885.

"In his invaluable work on Taxation, Mr. Desty sums up the doctrine thus: "A law imposing a license tax on transient persons doing business within the State does not violate the provisions of the Federal Constitution. Transient persons selling goods within the State by wholesale or retail, on land or on water are liable to pay a license tax. To authorize a person to sell foreign merchandise without a license, he must have received it in exchange for articles of his own manufacture, or for productions of his own agriculture. The mere fact that a clerk, merchant, or other person solicits orders or favors in his business does not necessarily bring him within the law authorizing a license tax to be imposed upon solicitors. The law means persons engaged in that particular class of business for a profit, or as a means of livelihood. * * * A drummer or commercial traveller is not a peddler, because he does not carry with him the goods sold. A State law imposing a license fee upon merchants who go from place to place soliciting orders is not unconstitutional as involving a duty or impost on imports, or a regulation of commerce, or unequal taxation. It is a legitimate tax on business.' 2 Desty Tax'n, 1889, 1890.

"We will now cite some of the State decisions involving this question.

"In *Ward v. Maryland*, 81 Md. 279, it was held 'that it is within the power of the State to tax, in the shape of a license, any trade, business, or occupation, when carried on in its borders by those who are not permanent residents of the State, whether foreigners or citizens of other States; that even if this law is to be regarded as restrictive as to non-residents, and discriminating (in favor of her own citizens) in its character and design, it still simply imposes a tax on a particular business carried on in a particular mode within the limits of the State, which it is perfectly competent for the legislature to regulate and restrain.' That case was carried to the Supreme Court of the United States, and its disposition therein will be noticed hereafter.

"In *Cole v. Randolph*, 81 La. Ann. 585, it was held 'that the law imposing a license tax on transient persons doing business within the State does not violate that provision of the Constitution of the United States vesting in Congress the exclusive power to regulate commerce among the several States.'

"In *Sears v. Board Com'rs Warren Co.*, 86 Ind. 267, it was held that the provision contained in 'An act concerning licenses to vend foreign merchandise,' etc., which required a license fee to be paid by travelling merchants and peddlers who are not residents of the State to vend foreign merchandise, is not in conflict with the inter-State commerce clause in the Constitution of the United States.

"In *Robbins v. Taxing District*, 13 Lea, 803, it was held that the law providing that drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares and merchandise therein by sample, shall be required to pay a specified privilege tax is constitutional and valid. This case went to the Supreme Court of the United States, and its reversal is the decision applicant relies on here.

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"Let us now cite some of the leading cases decided in the United States District and Circuit Courts.

"*In re Rudolph*, 2 Fed. Rep. 65, was from the Circuit Court of the district of Nevada. It was therein held that a statute of Nevada which provided that every travelling merchant, agent or drummer, or other person selling or offering to sell any goods, wares or merchandise of any kind to be delivered at some future time, or carrying samples, and selling or offering to sell goods, wares or merchandise of any kind similar to such samples, to be delivered at some future time, should procure a license, etc.; and further providing that any person pursuing such occupation without license should be guilty of a misdemeanor, did not violate the constitutional provisions, relative to laying duties or imposts on imports, and inter-State commerce.

"In a most elaborate and well considered opinion in *ex parte Thornton*, in the Circuit Court for the Eastern District of Virginia, HUGHES, J., cites and reviews all the leading cases, and his conclusions as stated in the syllabus are: 'If the legislature of a State frames a law relating to merchants and sample merchants, with the intention to discriminate against non-residents in favor of residents, and against goods in other States sold by sample in favor of goods held within the State for sale, and if the legislation has this practical effect, then such provisions are null and void, and all arrests and prosecutions under them are illegal. The legislature has the right to discriminate against sample merchants in favor of merchants; the State being sovereign mistress of her own policy in determining what classes she shall levy a license-tax upon, and what classes she shall exempt from such taxation, and in deciding how light or how heavy she shall make such tax. The assumption that a merchant is necessarily a resident, and that a sample merchant is necessarily a non-resident, is an arbitrary one, and one which the court of justice has no right, by mere inference, to accept as true. It is only when a law discriminates against a foreign resident of a certain class, or against the goods held in another State for sale, in favor of a resident of the same class, and goods held within the State for sale, that it is obnoxious to the provisions of the national Constitution in relation to the privileges and immunities of citizens of the several States, or the regulation of commerce with foreign nations and among the several States, or the prohibition of laying imposts or duties on exports or imports.' 12 Fed. Rep. 539.

"In *Memphis & L. R. R. Co. v. Nolan* (Circuit Court, Western District of Tennessee) it was held that 'a license or privilege tax imposed by a State on the business of an express company, engaged solely in commerce between the States, where there is no intention by this means to obstruct or prohibit the business, is not unconstitutional.' The learned judge, delivering the opinion, says: 'As I read the cases, the principle is that so long as it is not a direct tax on property carried in the commerce between the States, imposed either on the goods, or indirectly collected from them, and is only a tax on the franchise granted to the carrier in consideration of the grant, or what is the same thing, a tax or tribute demanded for the privilege of doing the business, the prohibition of the Constitution does not apply. Of course, in analogy to our State adjudications, if under the disguise of taxing a franchise or priv-

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illego, the State should undertake by excessive taxation to obstruct or prohibit the business of inter-State commerce, the constitutional provision would protect against it.' 14 Fed. Rep. 532.

"We might cite many other authorities which upon principle are in alligment with the foregoing, taken from elementary authors, and from the State and subordinate federal courts; but these are sufficient to serve to illustrate the unanimity with which the question has been settled in so many various tribunals of standing and ability, inferior to none in the country. Another fact connected with these decisions is the unanimity and confidence with which they cite and rely upon decisions of the Supreme Court of the United States in support of the conclusions they announce. This becomes passingly singular when the *Robbins* case, here relied on, states an entirely different and contradictory rule; and that too without overruling previous decisions of the same court in diametrical opposition to it.

"Let us cite some of these decisions.

"In *Nathan v. Louisiana*, Justice McLEAN says: 'Now the federal government can no more regulate the commerce of a State than a State can regulate the commerce of the federal government. * * * The taxing power of a State is one of the attributes of sovereignty, and when there has been no compact with the federal government, or cession of the jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State which are not properly denominated the means of the general government; and as laid down by this court, may be exercised at the discretion of the State. The only restraint is found in the responsibility, of the members of the legislature to their constituents. If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of the State may be thereby essentially impaired.

"But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions named, is subject to its laws, and also numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no federal power under the Constitution which can impair this exercise of State sovereignty.' 8 How. 78. Same doctrine is declared in *City of New York v. Miln*, 11 Pet. 103.

"In *Gibbons v. Ogden*, 9 Wheat. 203, the court, in commenting on inspection laws, uses this language: 'They form a portion of that immense mass of legislation which embraces every thing within the territory of the State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are a component part of this mass. * * * No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation.' See also, *License Cases*, 5 How. 504.

"In *Woodruff v. Parham*, 8 Wall. 123, it was held that 'uniform tax imposed by a State on all sales made in it, whether they be made by citizens of it, or citizens of some other State, and whether the goods sold are the produce

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of that State enacting the law, or of some other State, is valid. This doctrine was reaffirmed in *Hinson v. Lott*, 8 Wall. 148, where the same State statute was involved; and after discussing the validity of the statute that profound jurist, Mr. Justice MILLER, concludes his opinion by saying: 'As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State.'

"When the case of *Ward v. Maryland*, *supra*, came before the Supreme Court, the judgment of the State Court was reversed, and the act declared invalid, not indeed as in contravention of the inter-State commerce provision, but because it imposed a discriminating tax upon non-resident traders trading in the limits mentioned, and that it was *pro tanto* repugnant to the federal Constitution and void. The provision of the Constitution which was violated was that which guaranteed and secured to the citizens of each State all privileges and immunities in the several States. Const., art. 4, § 2; 12 Wall. 418. Mr. Justice BRADLEY alone dissented, he being of opinion that the act violated the inter-State commerce clause, and that it would so do, 'although it imposed upon residents the same burden for selling goods by sample as is imposed upon non-residents.'

"In the subsequent case of *Osborne v. Mobile*, 16 Wall. 479 (opinion by Chief Justice CHASE), it is said: 'It is as important to leave the rightful powers of the State, in respect to taxation, unimpaired, as to maintain the powers of the federal government in their integrity.' He further says, speaking of the decision in the case of State tax on railway gross receipts (15 Wall. 284): 'The whole court agreed that a tax on business carried on within the State, and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected.'

"These two last cases are directly in point. They were decided by a unanimous court. They are not overruled in *Robbins v. Tazewell District*, relied upon by applicant in this case. They are directly in conflict with the *Robbins* case, and the *Robbins* case is simply the opinion of a majority, and not of the whole court. WAITE, C. J., in to our minds an unanswerable opinion, concurred in by those profound and eminent jurists, FIELD and GRAY, dissented from the doctrine announced. Under such circumstances we do not feel bound by the *Robbins* decision; and not believing it to be the law of this land, we will not consider it as of binding force upon us.

"As conclusive as is to our minds the able dissenting opinion of the chief justice, there are one or more views of the case which he did not elaborate, and which in our opinion should condemn the doctrine announced.

"The strongest position tending to support the doctrine of the *Robbins* case is perhaps that taken in *Brown v. Maryland*, 12 Wheat. 419. It was there said: 'Any charge on the introduction and incorporation of the articles (of commerce) into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means of accomplish-

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ing that introduction and incorporation.' The result of the reasoning in that case was, says Judge STORY, 'that whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized and allowed by Congress, whether in the shape of a tax or other charge, or whether before or after their arrival in port, interferes with the exclusive right of Congress to regulate commerce.' Dissenting opinion in *City of New York v. Miln*, 11 Pet. 161. Now for the application of this doctrine to the *Robbins* case: In the opinion of a majority of the court it is conceded that the Tennessee law is not obnoxious to constitutional objection, either federal or State, in so far as citizens of Tennessee are concerned; and that as to them it may be legally and rigidly enforced — enforced by criminal prosecution, accompanied with appropriate fines and penalties. In other words, that as to citizens of Tennessee, it matters not that the action of the State may allow them to restrain and prevent the introduction of goods into the country and be valid; the same action is invalid as to citizens of other States, merely because they are citizens of other States. Such doctrine, to say the least of it, is anomalous, if not paradoxical.

"Again as stated in the beginning of this opinion, our statute makes it a misdemeanor for a person to pursue the occupation of drummer, commercial traveller, or salesman by sample, without having first paid a license therefor. To do so is a criminal offense. In the *Robbins* case, under a law of similar character, it is conceded that the State had the right to pass and enforce such law against its own citizens. But the startling doctrine is announced that this same law is invalid and unconstitutional, and incapable of enforcement as to persons not citizens of the State, who invade its territory, and wantonly violate said law within its jurisdiction; in other words, that a general law of a State, penal in character, and violative of neither the federal nor State Constitution, is binding upon none save its own citizens. We have been accustomed to accept as elementary truth the doctrine that criminal laws are not respecters of persons, nor indeed can be, and that as to them no class of individuals may claim special immunity. Upon this subject, the Supreme Court of the United States, in *City of New York v. Miln*, emphatically says: 'No one will deny that a State has a right to punish any individual found within its jurisdiction who shall have committed an offense within its jurisdiction against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear that a State has as much right to guard by anticipation against the commission of an offense against its laws, as to inflict punishment upon the offender after it shall have been committed. The right to punish or to prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law.'

"The Constitution of the United States provides: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' The doctrine of the *Robbins* case goes further. It puts a premium upon non-citizenship, by discriminating in its favor against citizenship, and conferring upon it privileges and immunities which are denied to the citizens of the State. To such a doctrine we cannot yield our assent.

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"In conceding that the Tennessee law was constitutional and binding as to the citizens of that State, it occurs to us that the majority opinion in the *Robbins* case virtually and in fact conceded whatever of merit there was in any question involved in that case on the appeal, and that the concession and conclusion reached are directly at variance. To nullify such a State law by judicial action is, in our opinion, to exercise, to say the least, a doubtful power, if it is not a direct usurpation of unauthorized power, warranted neither by the letter nor the spirit of the constitutional provision invoked to sustain it. The fact that the law may and does affect more citizens of other States than of the individual State is no criterion by which to judge of its constitutionality or validity. Whenever her own citizens are or may be equally affected, we deny that courts of federal jurisdiction may question the motives of the State legislature in the passage of the act, much less declare it unconstitutional.

"The statute we are construing, and which in this proceeding we are asked to hold unconstitutional, is a general law of equal application to the entire State, and *pro tanto* is less objectionable than the Tennessee law, which applied only to a taxing district. It would, in our judgment, be a strained construction which would hold this law unconstitutional, within the spirit, much less the letter, of the provision of the federal Constitution regulating commerce between the States."

The *Robbins* case was followed by the Nevada Supreme Court in *Ex parte Rosenblatt*, and by the Louisiana Supreme Court in *Simmons H. Co. v. McGuire*; and the same doctrine was laid down by the Vermont Supreme Court without reference to that case, in *State v. Pratt*, May 28, 1877.

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(95 N. C. 286.)

Criminal law — assault — parent on child.

A parent's corporeal chastisement of his child, however severe and unmerited, will not be criminally punished "as excessive or cruel," if it was honestly inflicted, without malice, and did not produce permanent injury. (*See note, p. 286.*)

CONVICTION of assault on defendant's daughter, sixteen years old. She testified that defendant had a bad temper and frequently whipped her without cause; that he once gave her about twenty-five blows with a switch, or small limb, about the size of one's thumb or forefinger, with such force as to raise welks upon her back, and soon afterward gave her five blows more with the same switch, choked her, and threw her violently to the ground;

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causing a dislocation of her thumb joint; that she had given him no offense; that she did not know for what she was beaten, nor did he give her any reason for it at the time. No permanent injury was inflicted upon her person. There was corroborative testimony, and one witness saw her tongue hanging out of her mouth while being choked. The defendant and his wife, stepmother of the girl, swore that she was habitually disobedient, had several times stolen money, and was chastised at the time spoken of for stealing some cents from her father; that he never whipped her except for correction, and this he was often compelled to do for that purpose, and had never administered punishment under the impulse of high temper or from malice.

Attorney-General, for State.

John D. Bellamy, for defendant.

SMITH, C. J. It will be observed that the test of the defendant's criminal liability is the infliction of a punishment "cruel and excessive," and thus it is left to the jury without the aid of any rule of law for their guidance to determine.

It is quite obvious that this would subject every exercise of parental authority in the correction and discipline of children — in other words, domestic government — to the supervision and control of jurors, who might, in a given case, deem the punishment disproportionate to the offense, and unreasonable and excessive. It seems to us that such a rule would tend, if not to subvert family government, greatly to impair its efficiency, and remove restraints upon the conduct of children. If whenever parental authority is used in chastising them, it could be a subject of judicial inquiry whether the punishment was cruel and excessive — that is, beyond the demerits of the disobedience or misconduct, and the father himself exposed to a criminal prosecution at the instance of the child, in defending himself from which he would be compelled to lift the curtain from the scenes of home life, and exhibit a long series of acts of insubordination, disobedience and ill-doing — it would open the door to a flood of irreparable evils far transcending that to be remedied by a public prosecution. Is it consistent with the best interests of society, that an appeal should thus lie to the court from an act of parental discipline, severe though it may be, and unmerited by the particular offense itself perhaps, but one of a series evincing

stubbornness and incorrigibility in the child, and the father punished because the jurors think it cruel and immoderate?

While the ruling of the court is not without support in some of the adjudications, to which reference is made in 2 Whart. Cr. Law, § 1259, we prefer to abide by the rule by which the limits to the exercise of the right of family government are to be ascertained, laid down after a lucid exposition of the subject by that humane and just man, so long a member of the court, Judge GASTON, in *State v. Pendergrass*, 2 D. & B. 365; s. c., 31 Am. Dec. 416. This was a case where a school mistress, whose use of the rod upon a pupil left marks upon her person, which after a few days disappeared. We quote extracts from the opinion: "Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and like all others intrusted with discretion, he cannot be made penally responsible for errors of judgment, but only for wickedness of purpose. * * * His judgment must be presumed correct, because he is the judge, and also because of the difficulty of proving the offense, or accumulation of offenses, that called for correction; of showing the peculiar temperament, disposition and habits of the individual corrected, and of exhibiting the various milder means that may have been ineffectually used before correction was resorted to. * * * If he use his authority as a cover for malice, and under pretense of administering correction, gratifies his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice as an individual not invested with judicial power." We think also," he summarily concludes the discussion, "that the jury should have been further instructed, that however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offense of so young and tender a child" (she was six or seven years old), "yet if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act honestly in the performance of duty, according to her sense of right, but under pretext was gratifying malice."

While acts of indiscreet severity are not criminally punishable, unless under the conditions set out, their check for the good and welfare of society must be found in the promptings of parental affection and a wholesome public opinion, and if these are insuffi-

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cient they must be tolerated as an incident to the relation which human laws cannot wholly remove or redress.

Such are the concluding sentiments, and almost in the words of the judge.

So remarks READE, J., in *State v. Rhodes*, Phil. 453: "The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations, such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because these relations are not subject to law, but because the evils of publicity would be greater than the evil involved in the trifles complained of, and because they ought to be left to family government." He adds: "Our conclusion is that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it, and that we will not interfere with or attempt to control it in favor of either husband or wife" (the case then before the court), "unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable."

The principle was extended to one living with the mother of the child, though not married, in *State v. Alford*, 68 N. C. 322, and BOYDEN, J., quotes with approval what was said by GASTON, J., in the *State v. Pendergrass*, *supra*, declaring that "punishment therefore which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent injury, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare."

The test then of criminal responsibility is the infliction of permanent injury by means of the administered punishment, or that it proceeded from malice, and was not in the exercise of a corrective authority. It would be a dangerous innovation, fruitful in mischief, if in disregard of an established rule assigning limits to parental power, it were to be left to a jury to determine in each case whether a chastisement was excessive and cruel, and to convict when such was their opinion.

We do not propose to palliate or excuse the conduct of the defendant in the present case. The punishment seems to have been need-

lessly severe, but we refuse to take cognizance of it as a criminal act, because it belongs to the domestic rather than legal power, to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity.

There is error. Let this be certified to the end that the verdict be set aside and a *venire de novo* ordered.

Error.

Judgment reversed.

NOTE BY THE REPORTER.—This decision seems strongly opposed to authority. Wharton (Cr. Law, § 681), says: "If the parent chastising the child exceed the bounds of moderation, and inflict cruel, merciless or unnecessary punishment, he is subject to indictment." Citing *Com. v. Coffey*, 121 Mass. 66; *Com. v. Blaker*, 1 Brewst. 311; *Neal v. State*, 54 Ga. 281; *Johnson v. State*, 2 Humph. 283; *Fletcher v. People*, 52 Ill. 395; *State v. Bitman*, 13 Iowa, 485. This doctrine is laid down by Schouler Dom. Rel., § 244.

Bishop says (1 Cr. Law, § 882): "In reason, if the parent acts in good faith, prompted by true paternal love, without passion, and inflicts no permanent injury on the child, he should not be punished merely because a jury, reviewing the case, do not deem that it was wise to proceed so far." Citing *State v. Alford*, 68 N. C. 322.

The cases cited by Wharton all sustain his conclusion. The *Johnson* case was relied on in the *Fletcher* case, where the parent confined a blind boy in a damp and cold cellar without fire, for several days in winter, and anointed him with kerosene because he was covered with vermin. In the latter, the court said, "this authority must be exercised within the bounds of reason and humanity. * * * It would be monstrous to hold that under the pretense of sustaining parental authority, children must be left, without the protection of the law, at the mercy of depraved men and women, with liberty to inflict any species of barbarity short of the actual taking of life."

In the *Neal* case the defendant was punished for "one lick" with a saw twenty-two inches long and three-fourths of an inch wide, on a girl ten years old." The court called him a "brute."

In the *Bitman* case, a cruel and inhuman whipping and beating of a child three years old was held criminal. "Reasonable correction" is the limit, the court said.

The *Coffey* case was as follows: On the trial of an indictment for an assault and battery upon the minor daughter of one of the defendants, there was evidence that the defendants, accompanied by a sister of the minor, went to the house where the girl, who was sick, was living and told her that they had come to take her away; that the girl said she did not want to go, and the father said, "You are my daughter, and must go;" that one of the defendants, a lawyer, asked the father if that was his daughter, and on receiving an affirmative answer, said, "Then I command you to take her;" that the father took hold of her around the waist, and attempted to lift her when she said, "That hurts me," and he at once desisted; that the defendants then against her wish, took her out of the house in a chair in which she was sitting, put her in

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a wagon and drove her slowly to a room which the father had provided for her. There was also medical evidence that it was unwise to remove her in the condition she was in. The sister testified that her only object in getting the girl away was to get her under the influence of the Roman Catholic church. The lawyer testified that he was only present as legal adviser of the father. *Held*, that the evidence warranted the jury in finding that the force used was excessive and unjustifiable, in the sick condition of the daughter; and in finding that the defendants acted, not in the exercise and support of the rightful authority of the father, but in the execution of a scheme of the lawyer, and under his direction and control only; and that the jury were warranted in returning a verdict of guilty.

STATE V. LOCKYEAR.

(95 N. C. 632.)

Sale — of intoxicating liquors — furnishing members of club.

A number of persons in Raleigh, in 1885, organized and incorporated a club for social and literary purposes. The members, but no other persons, were permitted to purchase from the defendant, its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, simply sufficient to cover the cost. In 1886, at an election in Raleigh, under the Local Option Act, a majority of the votes were cast for prohibition. *Held*,

- (1) That such furnishing liquors under these circumstances was a sale.*
- (2) That such sale was a misdemeanor under the Local Option Act.

CONVICTION of unlawfully selling intoxicating liquors. The facts appear in the opinion.

Geo. V. Strong and J. H. Flemming, for State.

Charles M. Busbee and R. H. Battle, for defendant.

SMITH, C. J. The defendant is indicted for selling spirituous liquor in the township of Raleigh, in violation of section 3116 of Code, and upon the trial of his plea of not guilty, the jury, in a special verdict, find as follows:

That at an election regularly called and held in Raleigh township, Wake county, on the first Monday in June, 1886, under the provisions of chap. 32, vol. 2, of Code, to ascertain whether spirituous liquors might be sold in said township, a majority of the qual-

* *Contra: Com. v. Pomphret* (137 Mass. 564), 50 Am. Rep. 840.

ified voters of said township cast votes on which was written the word "Prohibition," and the result of said election was in favor of prohibition, and the same was duly declared on the second day after said election by the authorities duly empowered so to do; and that no election has since been held reversing said election.

2. That the defendant is an employee and steward of an organization existing in the city of Raleigh called "The Capital Club," and in that name duly incorporated under the general law, in 1885, for literary and social purposes.

3. That the said organization has nearly one hundred resident members, the full membership being limited to one hundred and twenty-five, and a few non-resident members. Under the constitution and laws of said Capital Club, no person can gain admittance to the rooms of said club, except the members thereof, or such friends of the members as live outside of Raleigh township, and are especially invited and introduced in the club; and that the leading magazines and papers are kept in the reading room of said club; and while there are no lodging rooms in the club except for its servants, some of its members spend a large portion of their time there daily.

4. That among other things, and incidental to the main purpose of the organization, the club furnishes refreshments to its members, such as liquors, cigars and meals, for their convenience and accommodation, and a small stock of spirituous liquors, wines and beer, is kept on hand and furnished to the members at a price fixed by the house committee of the same, and intended to be just sufficient to cover the cost; that the object of this is not to make profit upon the liquors, wines and beer so furnished, and the price at which they are dispensed does not cover their cost and the expenses attendant upon keeping and serving the same, and part of the initiation fees and monthly dues of the members have to be applied to that purpose, to pay the said cost and expenses.

5. That it is one of the objects of the club to entertain strangers who may visit the city of Raleigh.

6. That no person other than members can obtain any liquor, wine or beer or other beverage or refreshments in or from the club.

7. That the defendant, as steward of the club, furnishes spirituous liquors, wine and beer to the members of the club in quantities less than a quart, for which he receives prices fixed by the house committee.

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8. That on the 10th day of July, 1886, the defendant, as such steward, delivered spirituous liquors to a member of the club, being a person to the jurors unknown, and received the price fixed therefor from said member, and that the said delivery and payment were in the club house.

Upon the said facts, if the court be of opinion that the defendant is guilty, the jury find him guilty; but if the court be of the opinion that the defendant is not guilty, the jury find him not guilty.

The court adjudged the defendant not guilty, and the State appealed.

The section under which the indictment is framed is very positive and peremptory in its terms. It declares when such is the result of the popular vote favoring prohibition, that "then and in that case it shall not be lawful for the board of commissioners to license the sale of spirituous liquors, or for any person to sell any spirituous liquors within such county, town or township" until another and reversing election shall be held, "and if any person shall sell any spirituous liquor within such territory as specified," such person offending shall be guilty of a misdemeanor.

There can be no question that in a strict legal sense the transaction described in the verdict is a sale of spirituous liquors. All the elements of an executed contract are present. The corporate body, a legal entity, and the owner of the liquor, through its servant the defendant, delivers it to the purchaser at his call, and receives a fixed compensation in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for and becomes the property of the club. Can there be any doubt that a corporation may make contracts and deal with a corporator precisely as with a stranger, and valid obligations, capable of enforcement, be thus formed between the parties?

And is not this dealing with the prohibited subject directly within the terms of the statute, and does it not open the door to the mischiefs intended to be suppressed? It is not necessary that the vendor should be authorized to sell to any applicant as an ordinary retailer. He is not allowed to sell to any one, and the fact that customers must be members of the association does not relieve him of criminal responsibility under the mandatory statute.

This interpretation of our own enactment finds support in adjudications upon the force and effect of similar enactments in other

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States, to which our attention has been called in the carefully prepared argument of counsel representing the State.

In *State v. Mercer*, 32 Iowa, 405, decided in 1871, there was an organization known by the name of the "Winterset Social Club," whose object was to supply its members with intoxicating liquors as a beverage. The defendant had possession of the liquors used, sold tickets to members, and these were received in payment from them of liquors delivered and drank in defendant's house. The court, BECK, J., delivering the opinion in reference to an error assigned in ruling out the articles of association which were offered in evidence in the court below, says, "that if they were of the purport as claimed by the defendant's counsel in their argument, we must conclude that they were correctly excluded by the District Court. They appear by the statement of counsel to have been nothing more than the foundations of an organization, the object and intent of which was to evade the law for the suppression of intemperance, a rather clumsy device by which the defendant and the members of the 'social club' hoped to defeat that law, and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. * * * If the liquors did not belong to the defendant, but to the 'club,' they were kept by him for the purpose of unlawful sale as the agent or employee of the club. The sale of tickets was in fact the sale of the liquors which was for the purpose of their unlawful use."

In *Marmont v. State*, 48 Ind. 21, determined in 1874, a German club, consisting of about forty persons, had been formed in Indianapolis for social Sunday meetings, to which each contributed a small sum on entering, and paid small monthly dues afterward. With this fund the treasurer would purchase a keg of beer on Saturday for the association, pay for it with its moneys, and deal it out in glasses on Sunday to members at five cents, which was covered into the treasury. Chief Justice BUSKIRK, in the opinion, says: "As the keg of beer when purchased belonged to the society, the question arises whether the society, by its agent, could make a valid sale of such beer to the persons composing the society. We know of no principle of law which forbids it." It was accordingly held that the transaction amounted to a sale within the meaning of the prohibitory statute.

But the case of *Martin v. State*, 59 Ala. 34, before the Supreme Court of that State in 1877, is more directly in point. The indict-

ment was for retailing liquor without license. An association had been formed in Montgomery, and incorporated under the general law for literary and social purposes. It was governed by a constitution and by-laws, and under them only the members or persons specially invited could enter the rooms of the club. In one of the rooms was kept a bar at which spirituous liquors, bought with the funds of the club, were sold only to members. The money paid for the liquor went into the common fund, and was used only to replenish the stock of liquors. None but members could buy or pay for liquors at the bar and it was sold to them in quantities less than a quart and was drank upon the premises. The court before which the trial took place, charged the jury that if the defendant sold spirituous liquors to members of the club without license, he would be guilty; and that this would be so, although he may have sold to none others than members of the club.

In the Supreme Court the instruction was approved, and *STONE, J.*, for the court, after defining the constituent elements of a sale as given in *Benjamin on Sales*, says: "Whenever the ownership is changed, this essential of the contract is complied with. In the present case there can be no question that the ownership was changed. The spirituous or vinous liquors were the property of the corporation. By the sale they become the property of an individual for a valuable consideration paid by the individual member to the corporation aggregate."

These rulings are confronted with others apparently looking in an opposite direction; in which according to defendant's contention, the true principle is to be sought, the most of them having pertinency to the present inquiry we are now to consider.

In *Seim v. State*, 55 Md. 565; s. c., 39 Am. Rep. 419, reported in 1880, the defendants, who were the president, secretary and treasurer of a club known as the "Concordia," an association incorporated under the general law, and formed upon the basis and for purposes essentially similar to ours, were prosecuted for selling beer to a member on Sunday in violation of the statute. The court held that "the transaction was not a sale of the beer to Springer within the intent and meaning of the act of 1866." The act mentions among the forbidden articles, besides spirituous liquors, cordials, lager beer, wine, etc., "or any other goods, wares or merchandise whatever," and in arriving at the meaning of the enactment, the court says it does not embrace such organizations, for if it did, a

meal could not be furnished "to a member on Sunday without violating the law," inasmuch as a meal would be equally included in its prohibitory words. This case is disposed of on a construction of the statute.

In *Tennessee Club of Memphis v. Dwyer*, 11 Lea, 452; s. c., 47 Am. Rep. 298, decided in 1883, the club was formed and incorporated upon the same principles and for similar general purposes, having two hundred members, and liquors of the club are furnished by an officer and servants to members who might apply for it. The defendant, clerk of the County Court, issued a distress warrant against the corporation to enforce payment of a sum claimed to be due from it as a retail liquor dealer. The suit in equity was instituted to restrain the collection of the alleged debt. The sole question passed on at the hearing was whether the complainant was under the law a liquor dealer, and liable as such to the tax. The opinion, delivered by COOKE, J., reviews the cases from Alabama, Indiana and Maryland, and that of *Recard v. People*, 79 Ill. 85, where the ruling was similar to that in the two first mentioned, and arrives at the same conclusion as the court of Maryland, that the disposition of liquors among members, although upon payment of a price, is not within the purview of the statute. It declares the transaction is not a selling in itself, but a distribution of common property among its owners. The tax is put upon retail liquor dealers, as upon "other merchants," indicating, in the opinion of the court, a legislative purpose "to impose this tax upon those who engage in the retailing of liquors as a business."

In *Commonwealth v. Smith*, 102 Mass. 144, the issuing of checks to the contributing members, according to the sum advanced by each, with a right to a proportionate quantity of the liquor bought with the common fund was declared not to be a sale, but a distribution of common property among the several owners of it.

Similar ruling is made in *Graff v. Evans*, 8 Q. B. Div. 373, in 1881. FIELD, J., says: "I think the true construction of the rule is that the members were the joint owners of the general property in all the goods, and that the trustees (in whom the property was vested) were their agents with respect to the general property in the goods, although they had other agents with respect to special property in some of the goods. A sale involves the element of a bargain. There was no bargain here. There was no contract between two persons, because Foster was vendor as well as vendee."

We do not undertake to reconcile the conflicting views taken by the different courts in regard to the character of these transactions among the members of the club within their walls, and will say that in our opinion the case before us involves all the requisites of a legal sale, and as it is within the words of our prohibitory act, so it is within the mischief which it is intended to suppress. Without going into the refinements which are apparent in some of the opinions, we are not able to exempt the act imputed to the defendant from the denunciation conveyed in the broad and comprehensive words which forbid "any person to sell any spirituous liquors" within the designated locality. Nor need we revert to the facilities which a contrary construction would afford for an evasion of the law by the formation of such associations, which if they did not obstruct the statute in its obvious purposes would admit of discriminations in the community equally adverse to its intended general operation.

We have thus given our opinion of the proper construction of the enactment in its application to cases like the present, and departed from our usual practice to refrain from passing upon the merits of the case on appeal when not properly constituted in court for the similar reason given in the disposition of the case of *McBryde v. Patterson*, 78 N. C. 412, where the same impediment was met that it was "the wish of the parties" that the controversy should be settled and the law declared so that it may be observed in its integrity. *State v. Tyler*, 85 N. C. 569.

But the appeal must be dismissed because no judgment discharging the defendant has been rendered so far as the record shows, and it has been too often decided, and again at this term in *State v. Hazell*, to need a reference that an appeal cannot under such circumstances be entertained. The adjudication upon the special verdict is but to render it complete and perfect.

Dismissed.

STATE V. EDENS.

(95 N. C. 603.)

Criminal law — husband and wife — slander.

A husband is not indictable for slandering his wife.

CONVICTION of slander. The head-note states the case.*Attorney-General, for State.**John C. Bellamy, for defendant.*

SMITH, C. J. We do not find it necessary to pass upon the form of the indictment and the effect of its omission to state slanderous language imputed, or to aver that it was uttered in the hearing and presence of any one, both of which are required to be averred in a complaint in a civil action, since we propose to dispose of the appeal upon the ruling to which the first exception is taken, with the remark that similar forms of indictment have been heretofore before the court and acted on without objection for these alleged defects. *State v. McDaniel*, 84 N. C. 803; *State v. Aldridge*, 86 N. C. 680.

Can an indictment be sustained against the husband for charging the wife with incontinency? At common law verbal slander was not the subject of a criminal prosecution, and is now a misdemeanor only in the case of the imputation of a want of virtue in an innocent woman made in a wanton and malicious attempt to destroy her reputation.

Does the enactment embrace those sustaining marital relation or is its operation confined to those not thus related?

The changes made in the Constitution of 1868, and the enactments in pursuance of its provisions in reference to married women, are directed to the preservation and disposal of property, as separate estate, but do not materially affect the personal relations of the parties except as incidental to property and its use. This right she may assert against her husband as well as against a stranger, now in an action at law, as is decided in *Manning v. Manning*, 79 N. C. 293; s. c., 28 Am. Rep. 324. But we think it manifest that she cannot maintain an action against him and recover damages

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for an injury to her person or good name, for these are inconsistent with the legal status resulting from marriage. In New York, under a statute authorizing any married woman to sue in her own name and recover damages against any person or body corporate for an injury to her person or character, and that money so recovered should be her separate estate, it was held that she could not sue her husband for an assault and battery or slander. "These words," says Mr. Bishop, in the second volume of his work on the Law of Married Women (§ 377), "it was admitted, are broad enough to cover these actions ; but on the other hand, the policy and general purpose of the statutes extending the rights of married women are opposed, and they must prevail over general words plainly introduced for another purpose. It has been deemed however that the policy of the law is against extending the authority of wives to sue their husbands."

This reasoning applies with equal force to the construction of our own law, and excepting those of marital relations from its comprehensive scope, including all others. It may be suggested that an indictment might lie, while an action for damages would not, as in case of the assault and battery of the wife by the husband. But it is not correct to say that such an indictment may in all cases be maintained. It is only where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to the person is inflicted, or where it is prompted by a malicious and wrongful spirit, and not within reasonable bounds, that the law interposes to punish. In other cases, short of these extremes, it drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of them in a public prosecution. It presumes that acts of wrong committed in passion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot it out of memory. So too the harsh and cruel word that sends a pang to the sensitive heart may be recalled, and relations that should never have been interrupted by an unkind or unwarranted expression, again restored. The unnumbered mischiefs that might flow from making an unguarded and false imputation upon the wife's chastity the subject of a public criminal proceeding, are so obvious that we cannot think the general assembly intended such a possible result. Not only might this destroy the freedom and cordiality of marital intercourse, but it would tend to make a perpetual estrange-

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ment and severance, and cut off the reconciliation that may be expected to succeed a temporary difference and the atonement of a full repentance. Our law regards the marriage relation sacred and permanent, life-long in its duration, and it leaves temporary differences and wrongs which one may do to the other to the corrective hands of time and reflection, in cases where they admit this remedy. We are not disposed, in carrying out the policy of separate properties, to break in needlessly upon that oneness of husband and wife, which is the fundamental and cherished maxim of the common law, by extending the act beyond all the beneficent purposes it was intended to subserve, to cover cases of slander.

The judgment cannot be arrested, because the woman is not described in the indictment as wife of the defendant, but the jury ought to have been instructed, upon the evidence, to acquit.

The verdict must be set aside and a *venire de novo* awarded.

Error.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

WILLOUGHBY V. IRISH.

(25 Minn. 63.)

Statute of limitations — payment by joint debtor

A payment by one joint debtor, before the statute of limitations has run upon the obligation, does not postpone the statute as to another.*

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

Ingersoll & Ovitt and Henry Burleigh Wenzell, for appellant.

Uri L. Lamprey, for respondent.

VANDERBURGH, J. Willoughby held the joint note of Shelton and Irish, Shelton being the principal debtor. The latter, before the statute of limitations had run, made partial payments upon the note, acting severally for himself. Plaintiff has brought this action against both joint makers, claiming that the separate payments of Shelton arrested the operation of the statute alike as to both. The defendant Irish has answered, setting up the statute as a bar to plaintiff's claim. The question is therefore fairly presented for the first time for determination in this court, under the present statute, whether a partial payment by one of several joint debtors, before a note is barred by the statute, and within six years before

* Same effect, *Walters v. Kraft* (23 S. C. 578), 55 Am. Rep. 44.
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suit brought, takes the case out of the operation of the statute as to all the joint debtors, or only as to the one who makes such payment.

Under the provisions of the statute then existing (Pub. Stats. 1858, chap. 60, § 24) in relation to partial payments, this court held in *Whitaker v. Rice* (1864), 9 Minn. 1 (13), that the effect of such payment made after the debt became due, and before the statute had run, "prevents any interruption of the obligation originally assumed;" and hence, the operation of the limitation act being suspended by the payment, the debt was kept alive, and remained in full force as respects all the debtors or obligors originally liable. This construction arose from the peculiar frame of the statute, and was based upon the old doctrine of presumptions. That is to say, the presumption of payment arising from lapse of time is rebutted by the acknowledgment or part payment of the debt, and the effect thereof is to continue the original debt as a subsisting obligation. The latter construction and present policy of the law is otherwise. Statutes of limitation are considered statutes of repose, intended to afford security against stale demands. The original debt is no longer demandable, and the remedy for the enforcement of the obligation thereof is gone, after the statute has run, hence something more than a mere admission or confession of its existence is necessary to renew it. And this distinction is, as we shall see, a very important factor in the determination of the question presented in this case.

In the revision of 1866, the section above referred to was repealed, and the preceding section (23) amended so as to make it an exact transcript of the section of the New York Code upon the subject. The statute as amended, and as it has since remained, is as follows (Gen. Stats. 1878, chap. 66, § 24): "No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

Section 23 (Pub. Stats. 1858) was, *pro tanto*, a transcript of the New York statute, and the provision in relation to the effect of payments (section 24), as it stood originally, was incorporated in a separate section in the form we find it, the arrangement seemingly being an intentional departure from the New York statute as respects the subject of that section. *Whitaker v. Rice, supra*.

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The change made by the amendment of 1866, in view of the decision in *Whitaker v. Rice*, and the construction which had previously been given to the New York statute in that State, then well established, are very strong evidence of an intention on the part of the legislature to adopt the law of that State upon this subject as there construed.

Under the statute there must be a promise or acknowledgment or a part payment, and the acknowledgment relied on must be sufficient to imply a promise, *Whitcomb v. Whiting*, 2 Doug. 652; s. c., 1 Smith Lead. Cas. (8th ed.) 982, 988; *Denny v. Marrett*, 29 Minn. 361; *Moore v. Bank of Columbia*, 6 Pet. 86; and in respect to part payments the same rule applies. It must appear that the debtor intended to recognize the obligation of an entire debt of which he has paid a part so as to imply a promise. *Brisbin v. Farmer*, 16 Minn. 187, 215; *Young v. Perkins*, 29 Minn. 173; *Chadwick v. Cornish*, 26 Minn. 28. "It is only reliable as evidence of a promise or from which a promise may be implied." *Shoemaker v. Benedict*, 11 N. Y. 176, 185; s. c., 62 Am. Dec. 95. It is the new promise or contract, upheld by the original consideration, which must be relied on to support an action otherwise barred by lapse of time, though the declaration in form pursues the old contract or cause of action as the ground of recovery. *Winchell v. Hicks*, 18 N. Y. 558.

Judge STORY, in his masterly discussion of the subject in *Bell v. Morrison*, 1 Pet. 351, 371, says: "The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it has lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands, not by its original force, but by the new promise, which imparts validity to it. Proof of the latter is indispensable to raise the *assumpsit* on which an action can be maintained. It was this view of the matter which first created the doubt whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off as a support to the old.

What indeed would seem to be decisive on this subject is that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover by those terms he cannot recover at all."

Recurring to the pivotal point in this case, if there must then be a new promise, express or implied, to sustain an action, can one of several joint debtors, from the mere fact of the existence of the joint liability, and having no authority in respect to each other except such as results from that relationship, by his own several act or agreement create or renew a liability as against all such debtors for a debt otherwise barred by limitation? Logically, and upon principle, there can be but one answer to this question. No such authority or agency exists, or can be implied, from the joint contract as will authorize one to act for and bind the others so as to renew or extend their liability. Where the relation is merely that of joint debtors, neither is the agent of the other to make a new contract with the creditor, or to bind the others by a new promise changing or affecting their legal rights, or giving such creditor a right of acting against them which he would not otherwise have. And nothing can be added to the exhaustive and satisfactory discussion of the subject in *Bell v. Morrison*, *supra*, and *Van Keuren v. Parmelee*, 2 N. Y. 523; s. c., 51 Am. Dec. 322, and notes; *Shoemaker v. Benedict*, 11 N. Y. 176; s. c., 62 Am. Dec. 95.

But in *Whitcomb v. Whiting*, 2 Doug. 652, decided by Lord Mansfield in 1781, it was held, apparently without discussion or consideration, that "payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." And WILLES, J., adds: "The defendant has had the advantage of the partial payment, and therefore must be bound by it." This case is declared by the court, in *Coleman v. Fobes*, 22 Penn. St. 156, in which the doctrine was repudiated, "to be at the bottom of all the confusion that exists in the decisions in England and in this country on the subject of this statute in its relation to joint debtors." And in the notes to *Whitcomb v. Whiting*, in 1 Smith Lead. Cas. (8th ed.) 1018, it is subjected to the following just criticism: "The cases cited above establish that when the original cause of action is barred by the statute, the plaintiff must show a new promise within six years, consistent with that set forth in the declaration, and between the same parties; and yet in *Whitcomb v. Whiting* a payment by one man was held to revive the liability of another, although not authorized or ratified by him. But in truth, this decision was based on a conception which though inconsistent with the letter and spirit of

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the statute, prevailed for more than a century in the courts of justice, that if the presumption of payment arising from the lapse of time was rebutted by the acknowledgment or confession of the defendant, the end which the legislature had in view was sufficiently attained, and the plaintiff might recover without proving a cause of action within six years. It followed, as a necessary consequence, that if the debt was confessed to exist by any one competent to make such an admission, the acknowledgment would be equally good whether his authority did or did not extend to making a new contract." The case was however generally recognized as authority in England until the rule was changed by statute, though it is said by Chancellor Kent, in 3 Comm. *50: "Of late however the decision in *Whitcomb v. Whiting* has been very much questioned in England, and it seems now to be considered as an unsound authority by the court which originally pronounced it."

In this country, in some of the States, the rule has been changed by legislation; in others the doctrine is adhered to on the principle of *stare decisis*, while in a number of others the question has been re-examined, and the authority of that case repudiated; and it is safe to say that the general tendency and current of the decisions are against it. In Story Partn., § 324, the learned author sanctions this statement as to the state of the decisions, and adds: "In truth, the whole controversy must ultimately turn upon the single point whether the acknowledgment is a mere continuation of the original promise, or whether it is a new contract or promise springing out of and supported by the original consideration." Ang. Lim., § 260, note 5; Wood Lim. 611 *et seq.*; 3 Pars. Cont. *80; *Beitz v. Fuller*, 1 McCord, 541; s. c., 10 Am. Dec. 693, note; 1 Smith Lead. Cas. (8th ed.) 1020-1022; *Winchell v. Hicks*, 18 N. Y. 558; *Wallis v. Randall*, 81 N. Y. 164; *Littlefield v. Littlefield*, 91 N. Y. 203; s. c., 43 Am. Rep. 663; *Levy v. Cadet*, 17 Serg. & R. 126; s. c., 17 Am. Dec. 650; *Bush v. Stowell*, 71 Penn. St. 208; *Kallenback v. Dickinson*, 100 Ill. 427, and cases; *Campbell v. Brown*, 86 N. C. 370; s. c., 41 Am. Rep. 464; *Miller v. Miller*, MacArth. & Mack. 109; s. c., 48 Am. Rep. 738.

Some of the cases make a distinction between the effect of a partial payment and an acknowledgment or express promise, for the reason stated in *Whitcomb v. Whiting*, that the co-debtor has had the advantage of the partial payment, and hence should be bound by it but there would still be the same absence of authority to speak

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or act for a co-debtor as in the case of an express promise, and the doctrine is equally opposed to the policy of limitation acts considered as statutes of repose. A partial payment inures to the advantage of all, not by reason of any agency for the whole, but by operation of law; and if the payment is rightfully made, he who pays may recover of the others in contribution, if they ought to be charged.

Bell v. Morrison, 1 Pet. 351, 368; *Coleman v. Fobes*, 22 Penn. St. 156; s. c., 60 Am. Dec. 75. In *Campbell v. Brown*, 86 N. C. 376, 382; s. c., 41 Am. Rep. 464, the Supreme Court of North Carolina, though obliged to recognize this distinction from the binding force of previous decisions in that State, admit it to be unfounded, and declare that "if resort were had in the matter to principle as distinguished from precedent, it is impossible to understand how, in any case, the unauthorized acts and declarations of one party, though he be jointly bound, can be admitted to enlarge the promises or extend the obligations of another." In *Bell v. Morrison* the debt had already been barred when the new promise was alleged to have been made, and a further distinction is suggested between cases of that class and those where payments or new promises have been made before the statute has run; and upon this distinction Judge DENIO grounds his dissent in *Shoemaker v. Benedict*, *supra*. But it is founded upon no principle. If the agency exists in one case, it must in the other; and the same authority is required to bind one joint debtor, by the promise or partial payment of his co-debtor, before as after the six years have elapsed. There must be a new promise, express or implied, to keep a debt alive as well as to revive it. 1 Smith Lead. Cas. (8th ed.) 1022; *Dean v. Hewit*, 5 Wend. 257; *Tompkins v. Brown*, 1 Denio, 247.

We hold therefore, generally, that one of several joint debtors, holding that relation simply, cannot, by his act or promise, bind his co-debtors without their assent, so as to prevent the running of the statute as to them, either before or after the statute has run upon the original cause of action.

Order affirmed.

Newell v. Minneapolis, Lyndale and Minnetonka Railway Company.

NEWELL V. MINNEAPOLIS, LYNDALE AND MINNETONKA RAILWAY COMPANY.

(35 Minn. 112.)

Railway — steam, in street — servitude — ultra vires.

The public authorities may authorize the construction and operation of a railway for passengers in a city street, without compensation to adjacent lot-owners, although the railway is operated by steam-motors, and is used also to transport passengers from its terminus in the city to a point eighteen miles outside the city.

Such a lot-owner, the defendant being in possession of the street, may not raise the objection of *ultra vires*.

EJECTMENT. The opinion states the case. The defendant had judgment below.

Hart & Brewer and *A. L. Levi*, for appellant.

J. M. Shaw, Gordon E. Cole and *Cross, Hicks & Carleton*, for respondent.

BERRY, J. Plaintiff is owner of certain land abutting on a public street in Minneapolis, called "First avenue south," and therefore owner of the fee of the half of the street adjoining his premises, subject to the street easement. As the complaint alleges, defendant, a railway corporation, and assuming to act as such, has wrongfully entered upon plaintiff's portion of the street, and taken possession thereof for its road-bed, laying down ties and rails thereon, and using and continuing in possession thereof for the operation of its railway, all without plaintiff's consent, and without payment of compensation. The plaintiff brings this action in the nature of ejectment for a restitution. In our judgment the case can present but two questions:

1. Is the construction, maintenance and operation of defendant's railway the imposition upon the soil of First avenue south, adjacent to plaintiff's premises, of a servitude additional to the proper public easement in such street? If this question be answered in the affirmative, the case is at an end, for the additional servitude (if any there be), having been imposed upon plaintiff's soil without his consent, and without compensation, he is entitled to put a stop to its contin-

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uance. But if the question be answered in the negative, then the second question is, can the plaintiff object to defendant's use of the street for the purpose of its railway?

To answer the first question it is necessary to consider to some extent the nature of a street easement. The public easement in a public street is the public and common right to use the same for the passage of persons and things, and for purposes incidental thereto. The exercise of this right is subject, in some degree, to regulations to be made by the proper authorities. The ownership of the soil on which the street is laid being absolute, subject only to the street easement, the owner has the right to insist that the street shall be used and enjoyed for the legitimate purposes of its creation and existence, and for no others. As the right of use is public and common, every member of the public, *i. e.*, every person, is entitled to avail himself of it; and hence no person can lawfully monopolize its use, or what would amount to the same thing, use it so as to exclude any other person from it.

This proposition is however not to be understood as trenching upon any right which the public authorities may possess to prescribe the purposes for which a particular street shall be used, as for instance for light or heavy traffic, as the case may be. How the monopolizing of the use of a street, or the illegal exclusion of any one from it, is accomplished cannot be important. They may be effected either by an appropriation or occupation of the entire surface of the street, or by the use of a part of it in such way as to render its legitimate use by others impracticable, and thus practically deprive them of its use altogether. Thus for instance, an ordinary railroad, constructed and operated in and along a street, though it is used for the passage of persons and property, and is therefore, so far as this general nature of its business is concerned, using the street for proper street purposes, yet the mode of its construction or operation, or both, are such as to monopolize the street, and virtually and practically exclude the general public from its legitimate use. So that the use of the street for such railroad is inconsistent with the common and public use of it, in which every person is entitled to share, and hence it is held to be the imposition upon the soil of a servitude differing from, and additional to that of the proper and lawful street easement. The case of an ordinary street railway is otherwise. There the street is also used for the passage of persons and property, but in such manner as not substantially to interfere with the common and

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public right of every person to use the street also; and so the use of a street by such street railway is held not the imposition of an additional servitude. So that when a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the mode of use, the question of rightfulness depends upon whether the use objected to is consistent or inconsistent with the common public use, in which every person is entitled to share.

This question of consistency or inconsistency is a question of law, that is to say, the facts of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether a manner of using a street complained of is or is not, all things considered, a substantial infringement upon the common public right. We say a substantial infringement, all things considered, because it is not every mere inconvenience or temporary hindrance to which one person in using a street may be subjected by the manner in which another uses it, which presents a case of inconsistency with the common public right. The inconsistency must be such that the common public use cannot, in its substantial integrity, co-exist with the use complained of. If the existence of the latter is inconsistent with the substantial integrity of the former, then the latter cannot stand as a proper and lawful use of the street easement. If the use complained of is such that the public and common right of passage of persons and things cannot be enjoyed without substantial impairment on account of the manner of such use, then it is inconsistent with the public and common right, and not a proper and lawful use of the easement of the street. But no merely technical or trifling interruption or obstruction is to be regarded as a substantial impairment, for common sense requires that these words should receive a reasonable and liberal construction, and it must always be borne in mind that in organized civil society the individual must necessarily enjoy a common public right with reference to the general convenience and the rights of others. The foregoing rules and principles are, in our judgment, fully supported, either directly or by logical deduction, by *Carli v. Stillwater & Ry. Co.*, 28 Minn. 373; s. c., 41 Am. Rep. 290, and the authorities there cited.

It remains to apply them to the facts of this case as found by the court below to exist when this action was commenced, which so far as deemed material for this purpose, are as follows: At the

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time when this action was commenced defendant's railway extended from near the westerly end of the suspension bridge, a central place in the city of Minneapolis, for a distance of one and a half to two miles within the city limits; thence, *via* Lakes Calhoun and Harriet, for a further distance of about eighteen miles to Lake Minnetonka. Defendant's line of railway is a single track of three-foot gauge (with occasional turn-outs), and so laid with a light T rail that the top conforms to the surface grade of the street or roadway, and so planked at the sides of the rails, and filled and graded between the rails, that the track does not interfere with the passage of vehicles, or with any use of the highway, more than do the flat rails, well laid, of the ordinary horse railroad. The passenger cars are from thirty-four to thirty-seven feet long, and so constructed that travellers can readily step on or off the same to or from the street or road. Within the city, and as far out as Lake Calhoun, they are drawn, either singly or in trains of from two to four cars, and on rare occasions, in greater number than four cars, by Baldwin motors, which are small steam engines entirely encased in cabs, so that no part of the machinery is visible from the outside, and from nineteen to twenty-one feet long, having the appearance of a short car, except that a smoke pipe about nine inches in diameter stands a foot or more above the top of the cab. No bell or whistle is used. The steam is exhausted in the engine. Anthracite coal is used for fuel, making little or no smoke, and neither smoke nor steam is often perceptible. Between Lakes Calhoun and Minnetonka a narrow-gauge locomotive engine is used to draw some trains, and some are drawn by the motors. Six trips or more each way per day have been regularly made between the city terminus of the railway and Lake Calhoun, but a less number between Lakes Calhoun and Minnetonka. The cars are moved along First avenue south, past plaintiff's land, and through all the closely-settled portion of the city, at a speed of three to four miles an hour, and are furnished with air-brakes, and can be stopped in the distance of from two to six feet. Between the closely-settled portions of the city and Lake Calhoun the speed is greater, reaching six miles an hour, and between Lakes Calhoun and Minnetonka it is increased in some places to fifteen miles an hour or more. There are no depots, stations, or platforms connected with said railway, but within the city, and as far out as Lake Calhoun, the passengers are taken on and let off along the street, and at street crossings, whenever they choose, as is customary on

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street railways. The uniform fare for passengers within the city limits, as existing when this action was brought, has been five cents, with the same fare for persons residing near the line of the railway as far out as Lake Calhoun. Higher rates of fare for other persons travelling between the city and the lakes, and between the lakes or points outside of said city limits, have been fixed and received. Between Lakes Calhoun and Minnetonka the cars stop to take up and discharge passengers at any highway crossing. Within the city, as bounded when this action was commenced, defendant's railway has been operated solely for the carriage of passengers, and a large share of its business and income has arisen from passengers carried thereon from point to point, as they might desire, along the streets traversed by said railway. In the warm season it also carries many passengers, gathered up along such streets, to said lakes and back again, such lakes being suburban resorts, frequented in such seasons by inhabitants of, and sojourners in said city. Between Lake Minnetonka and a point near, but outside the recent boundary of the city, said railway has carried some cord-wood and other freight.

These are, in substance, the facts found by the trial court upon the branch of this case now under consideration, and upon them our decision must be based, for they are supported by the evidence; and if it be true that upon any particular point or points the evidence would warrant fuller or other findings, that defect (if it exist) should have been remedied upon a motion to correct the findings before bringing the case to this court.

Upon its findings of fact the trial court was of opinion, and so found, as conclusions of law, (2) that defendant's railway, as constructed and operated on First avenue south, and elsewhere within the limits of the city as bounded when this action was commenced, was and is a passenger street railway, and this character is not changed by the fact that between some point outside of said city limits and Lake Minnetonka it ceases to be a passenger street railway; (3) that the construction and operation of said railway partly on that part of First avenue south of which the "ultimate fee" is in the plaintiff does not constitute any additional burden or servitude beyond the public easement contemplated in the dedication of the street, nor any taking or appropriation of the property of the plaintiff as owner of the fee.

Both of these conclusions are, in our judgment, correct.

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The first clause of the first, viz., that defendant's railway is a passenger street railway, is, in effect, a finding that its use consists in the transfer of persons along or over the streets within the city, and would seem to be a mere result or summing up of the previous findings of fact upon that subject, and it is therefore perhaps quite as much in the nature of a conclusion of fact as a conclusion of law. It is enough to say in regard to it that it is the legitimate result of the previous findings of fact. The last clause of this conclusion, viz., that this character of the railway is not changed by the fact that at some point outside of the city it ceases to be a passenger street railway, is right as a conclusion of law. If it is, in fact, a passenger street railway within the city limits, how can it become any thing else there because it becomes something else elsewhere? A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the former city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of the streets is just as legitimate, and just as clearly and completely a lawful and proper enjoyment of the public and common easement, in the one case as in the other.

Take the case of an old-fashioned stage line taking its passengers from its station, say at the Nicollet House, in Minneapolis, and conveying them to Shakopee, would it ever occur to any one that the use for that purpose of the streets of Minneapolis as far as they extended on the way would not be entirely legitimate, and entirely within the purposes of dedication, because the streets used were only a part, and small part, of the entire route of the line, and the line was run exclusively for the purpose of conveying persons to and from places outside of the city of Minneapolis? Or is it any objection to the use of a street by a horse railway that the line extends into the country, and carries passengers accordingly? Such illustrations as these (and they could be multiplied indefinitely), as it seems to us, demonstrate the correctness of the conclusion arrived at by the trial court which we are now considering. It cannot be that a proper use of the streets of a city can be made improper by the fact that the instrumentalities through which that use is enjoyed are changed, as respects their mode of operation, after the city boundaries are passed over, or that the use of the streets of a city for the purpose of going out of it, or of coming

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into it, can be improper or illegitimate, or in any sense the imposition of a servitude additional to the ordinary street easement.

The other conclusion of law, viz., that the construction and operation of defendant's railway does not impose any additional servitude, etc., has given us more trouble; for while the previous finding that defendant's railway is, within the city limits, a passenger street railway may be true in the sense that it is there a railway used and operated exclusively, or substantially so, for the transportation of passengers from one part of the city to another, still that fact alone and by itself would not materially distinguish it from what is styled by counsel an ordinary "commercial railway," used exclusively to bring passengers into, or carry them out of, the city. Yet this ordinary commercial road (so called) has been held by this court, in several cases, as well as by a majority of the courts in other States, to impose a servitude additional to the ordinary street easement, and therefore to infringe the rights of the owner of the soil over which the street is laid. It is otherwise however with the ordinary horse street railway. Where then is the distinction? Both are used for the conveyance of persons from one part of the city to another, and in that sense both are street railways, and both operated in aid of the street, to facilitate the passage of persons over the same. We think the answer to the question is found in the general rules and principles laid down, and to some extent expounded, in the early part of this opinion.

A railway upon a street, engaged in carrying persons and things over the same, whether from one point to another on such street or in the city, or from points inside to those outside, or *vice versa*, is or is not rightfully using the street (with, of course, the sanction of the proper authorities), according as its use is or is not consistent with the common public use of the street, in which every person is entitled to share. Now, whatever facts may exist in this case, or whatever facts may have been shown which are not embraced in any finding, there is nothing in the findings of fact from which it can be inferred, as a conclusion of law, that defendant's use of the street, in constructing, maintaining, or operating its railway, is inconsistent with the common public use; nothing to show that the two uses may not co-exist without any substantial infringement or interruption of the latter by the former. While so far as construction and maintenance are concerned, the facts are expressly found that the surface of the street is not essentially changed or disturbed,

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there is no fact found showing that the operation of defendant's railway seriously jeopardizes or interferes with the safety and security or convenience, as respects either person or property, of any one who desires to avail himself of the public and common right of user. It may well be that defendant's railway could be so operated, even as a purely passenger street railway, as substantially to interfere with, if not to put a practical end to, the use of the street by the general public. It is not impossible to conceive that any ordinary horse street railway could be operated with like effect. Suppose, for instance, that a horse railway were permitted to occupy the entire breadth of a street with its tracks, and to run its cars at the rate of one in one or two minutes, what would be the value of the ordinary street easement in such a state of facts? This illustration is, as it seems to us, in point for the purpose of showing that the manner and effect of operating a street railway are the tests of its rightfulness; and while the manner and effect of operating defendant's railway might have been such as to interfere substantially with the public and common right, the findings do not show that it was so in this case, which as it is important to bear in mind was tried with reference to the state of facts set up in the pleadings as subsisting at the time when this action was commenced.

The railway in question in *Carli v. Stillwater St. Ry. Co.*, 28 Minn. 373; s. c., 41 Am. Rep. 290, was neither more nor less than a connecting link between two ordinary (so called) commercial railways. The effect was the same as if one of these railways had been extended over it to a junction with the other, so that the railway in that case was really and in effect an ordinary "commercial railway," and in no sense "in aid of the street." Upon this ground the opinion and determination in that case proceeded, holding, under the decisions of this court, and in accordance with the view prevalent elsewhere, that as such ordinary commercial railway it imposed a servitude upon the street additional to the proper street easement. But the defendant's railway is a different thing, and clearly in aid of the streets over which it runs. It takes on and discharges passengers at any street crossing upon its line, as does an ordinary horse railway; and this practice applies as well to those who get on for the purpose of going out of the city or of coming into it, as to those who get on and also get off within the city limits. Such a railway is in aid of the street because it facilitates the passage of persons over the street, enabling them, in large num-

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bers, to pass over it with far less noise, trouble and expense than if each should pass on foot or in an ordinary vehicle, and without, so far as this case shows, any substantial interference with the public and common right of passage.

Upon all these considerations we therefore conclude that defendant's railway was, within the city, properly a street railway; and that its construction, maintenance and operation do not impose upon plaintiff's soil a servitude additional to that of the ordinary street easement, so as to make defendant's use of the street unlawful without compensation to plaintiff.

2. Having thus answered the first main question presented in this case in the negative, we are brought to consider the second, viz.: Can the plaintiff object to the defendant's use of the street (in the manner found by the trial court) for the purpose of its railway? We say whether the plaintiff can object, because if he cannot it makes no difference in this action whether defendant has in fact any legal right to construct, maintain and operate its railway on First avenue south or not. The plaintiff having, as we have seen, no right to object on the ground that defendant's use of the street imposed a servitude additional to the proper street easement, his objection, if any, must be that defendant is not authorized to use the street easement in the way in which it does. The charter of the city of Minneapolis commits the care, supervision and control of the streets to the common council. By ordinances passed March 22, 1882, before this action was commenced (in November, 1882), and subsequently, the council gave defendant permission to operate its railway, and with steam power, on First avenue south, and other streets, to June 1, 1883, a date subsequent to the trial of this action. As a result of this, and of the conclusion arrived at upon the first branch of the case, the defendant was in fact lawfully in its possession (such as it was) and use of the street, so far as the public authorities were concerned. It had, at least, their license and acquiescence in its favor.

But it seems that by an ordinance of July 9, 1875, a corporation, denominated the Minneapolis Street Railway Company, was granted the exclusive right, subject to conditions not here important, of constructing and operating street railways in the city of Minneapolis, in such streets as the city council may deem suited to that purpose; and by ordinances of July 3 and 8, 1878, said "company, its successors and assigns," were authorized, upon similar conditions

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as above, to construct and maintain a street railway line on First avenue south, and other streets (being the route of defendant's railway), and "to operate such line of railway with animal, steam or other power," the right to prohibit the use of steam when the public good required being reserved. On October 24, 1878, the Minneapolis Street Railway Company and the defendant, pursuant to authority given by their respective boards of directors, formally entered into a written contract, whereby, among other things, and for a sufficient consideration, the street railway company leased to the latter, for forty-three years, its rights and franchises to the use, for suburban railway purposes, of First avenue south and said other streets, and the lease was duly recorded November 17, 1878. Immediately upon the execution of this contract defendant entered upon First avenue south and the other streets mentioned, and at large expense constructed thereon its railway, which it has ever since maintained and operated, no other railway having been constructed on that route.

Now upon this state of facts and with reference to the conclusion arrived at upon the first branch of this case, both the public authorities and the street railway company appear to acquiesce in and sanction defendant's use of the streets. It matters not whether defendant is acting strictly within the terms of its charter or of the so-called lease from the street railway. It is there upon the ground, in actual possession (so far as necessary) and use of the streets. Whether it is there as a corporation, association or partnership, whether in the exercise of its lawful corporate franchises, or *ultra vires*, so long as its use of the streets is a proper street use, under sanction of public authority, the plaintiff cannot complain. If the exclusive franchise of the street railway company is invaded, either because the so-called lease is unauthorized and void as a lease, because executed without proper authority, or because the rights of that company are not transferable, or because defendant is not an "assign" within the meaning of the ordinance, that is the affair of the street railway company, or of the city, or possibly, of the State, and not of the plaintiff. For these reasons the second main question in the case must be answered in the negative also.

MITCHELL, J., dissented.

Order affirmed.

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(85 Minn. 121.)

Railroad — in street — duty to keep street safe — statute.

A railroad charter empowered the company to lay its track across any public highway or street, if necessary, on condition that it should put such highway or street "in such condition and state of repair as not to impair or interfere with its free and proper use." *Held*, that this was a continuing duty, and that although a crossing might have been adequate when constructed, yet if by reason of increase of business of the railroad or travel on the street it became dangerous or seriously obstructed travel on the street, the company was bound to provide some other mode of crossing, as by carrying the street over or under the track.

MANDAMUS. The opinion states the case. The defendant had judgment below.

Judson N. Cross and Frank H. Carleton, for appellant

Benton & Roberts, for respondent.

MITCHELL, J. This appeal is from an order quashing an alternative writ of *mandamus*, on the ground that the relator did not state facts sufficient to warrant the issuance of a writ.

The charter of respondent provides that "the said company shall have the right and authority to construct their said railroad and branches upon and along, across, under, or over any public or private highway, road, street, plankroad, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plankroad, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use." Laws 1857, Ex. Sess., chap. 1, subc. 1, § 7. The principal question raised by the appeal is the construction to be put upon this statute as to the extent of the rights conferred, and of the duty imposed upon the company.

The common-law rule is that where a person or corporation is given the right to build a railroad, or make a canal across a public highway, this gives them no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway at their own ex-

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pense, by some reasonably safe and convenient means of passage, although the statute contains no express provision to that effect. This duty includes the doing of whatever is necessary to be done to restore the highway to such condition; as for instance in case of a bridge, the approaches or lateral embankments without which the bridge itself would be useless. This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense. *Qui sentit commodum sentire debet et onus.* *King v. Inhabitants of Lindsey*, 14 East, 317; *King v. Kerrison*, 3 Maule & S. 526; *Leopard v. Chesapeake & Ohio Canal Co.*, 1 Gill, 222; *Northern Cent. Ry. Co. v. Mayor of Baltimore*, 46 Md. 425; *Eyler v. County Com'rs Allegany Co.*, 49 Md. 257; s. c., 33 Am. Rep. 249; *In re Trenton Water-Power Co.*, 20 N. J. Law, 659; *People v. Chicago & Alton R. Co.*, 67 Ill. 118; *Queen v. Inhabitants of Isle of Ely*, 15 Q. B. 827; *Paducah, etc., R. Co. v. Commonwealth*, 80 Ky. 147.

The provision of this statute imposing a duty on the company in favor of the public, while it is to receive a reasonable construction, must be liberally construed in favor of the public. There is no presumption that the legislature intended to limit or lessen the duty which would have existed in the absence of any provision expressly imposing it. On the contrary, their evident object was to make the duty more explicit and definite, and free from doubt. The fact stands out prominent that the legislature intended to preserve to the public the free and proper use of highways and streets, without impairment or interference, and that the use of streets and highways by the railway company should be permitted only on condition that this right of the public should be preserved. Of course, this is not to be understood in the absolute sense that the company could do nothing that would in any degree interfere with the use of the street by the public. The statute must receive a reasonable construction, and the legislature must be presumed to have understood that the construction and operation of a railroad upon, across, under, or over a street is necessarily attended with some incidental inconvenience. What was meant was merely that the company should put the street in such condition as to furnish the public a thoroughfare reasonably safe and convenient, and substantially as capable of free and proper use as it was before. Whatever accomplishes this end is a performance of the duty; what does not is an infraction of it. Hence in

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view of the manifest object of this provision in favor of the public, it is evident that the expression, "in such condition and state of repair as not to impair or interfere with its free and proper use," has reference not merely to the physical condition of that particular part of the street actually occupied by the company with its tracks, but also to the street as a thoroughfare of public travel, and to the uses to which the company put the street in operating its road.

For example, suppose the company construct their railroad under the street which they carry over their road by a bridge. The bridge immediately over their tracks might itself be properly built, and yet without the necessary approaches would be inaccessible to the public. This would not be a performance of the duty imposed by the statute. So again, if the company constructed their tracks on the surface of the street, they might plank or pave between the tracks so as to furnish a perfectly smooth surface for the passage of travel, and yet the tracks might be so numerous, and the passage of trains so constant, as to obstruct travel across the street as effectually as if a Chinese wall were built across it. This would not be putting the street in such a condition "as not to impair or interfere with its free and proper use," within the meaning of the statute.

While the company has the right, according as its necessities or conveniences may require, to construct its tracks either on the surface of the street, or over the street, or under it, yet this right is subject to the condition that it can be done so as not to impair or interfere with the free and proper use of the street. The right to lay their tracks on the surface of the street is *sub modo*, that is, by doing it so as not to impair or interfere with the use of the street. Whatever mode they adopt, they are bound to fulfill this condition, and if it cannot be fulfilled by laying their tracks on the surface of the street, they must adopt some other plan. See *King v. Kerrison*, *supra*; *Johnston v. Providence, etc., R. Co.*, 10 R. I. 365; *People v. Dutchess, etc., R. Co.*, 58 N. Y. 152.

It is also clear, upon both reason and authority, that this duty is a continuing one. It is not fulfilled by simply putting the street, at the time the railroad is built, in such condition as not to impair or interfere with its free and proper use at that time, nor even by maintaining it in such condition as would have accomplished that end had the circumstances and conditions originally existing continued. The requirement of the statute has a wider scope than this,

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and has reference to all future exigencies. The legislature never intended to fix or limit the duty of the company by the necessities of the public at any one time, or under any particular state of circumstances. They intended to impose upon the company the duty, from time to time, of putting the street in such condition and state of repair as changed circumstances, such as the increased travel on the street, or increased traffic on the railroad, might render necessary to its free and proper use. A condition of the street or mode of crossing the railroad might be entirely adequate for the accommodation of the public under one condition of things, and entirely inadequate under another; and consequently a provision which at one juncture would be a discharge of this statutory duty, would at another amount to its violation. For example, a single track laid on the surface of a street, in a small town, where the traffic on the railroad and the travel on the street were limited, might not, and probably would not, seriously interfere with the use of the street, while numerous tracks, in constant use, thus laid upon a crowded thoroughfare of a populous city, might almost entirely deprive the public of the use of the street. In the latter case it would be a mere technical quibble for the railway company to say that it had performed its duty because it had put the surface of the street in proper condition, although, by reason of constantly passing trains, the public were as completely prevented from crossing it as if the street had been divided by an impassable gulf.

The duty prescribed is to keep, at all times and under all circumstances, the streets, at points where they are intercepted by the railroad, "in a condition and state of repair so as not to impair or interfere with their free and proper use; and if this cannot be done with a surface crossing, the company must do it either by carrying their tracks under or over the highway, or the highway under or over their tracks; and the duty of thus restoring or preserving the free use of the street includes the doing of whatever is needed to accomplish the required end, and which is rendered necessary to be done by reason of the presence of the railroad in the street. *Parker v. Boston & Maine R. Co.*, 3 Cush. 107, 115; s. c., 50 Am. Dec. 709; *Com. v. Proprietors New Bedford Bridge*, 2 Gray, 339; *Cooke v. Boston & Lowell R. Co.*, 133 Mass. 185; *Cott v. Lewiston R. Co.*, 36 N. Y. 214; *People v. N. Y. Cent., etc., R. Co.*, 74 N. Y. 302; *Wellcomb v. Inhabitants of Leeds*, 51 Me. 313; *English v. New Haven, etc., Co.*, 32 Conn. 240; *Burritt v. City of New Haven*, 42 Conn.

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174; *Cent. R. Co. v. State*, 32 N. J. Law, 220; *Railroad v. Commissioners*, 31 Ohio St. 338; *Maltby v. Chicago & W. M. Ry. Co.*, 52 Mich. 108; *Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524; *Farley v. Chicago, R. I. & P. R. Co.*, 42 Iowa, 234; *Manley v. St. Helen's Canal & Ry.*, 2 Hurl. & N. 840.

The application of these principles to the present case leads us to the conclusion that the court below erred in quashing this writ. The petition upon which the writ was issued alleges, in substance, the following facts: In 1868 the respondent constructed its road through the city of Minneapolis, and under the authority given by its charter, laid its track upon and across Fifth street north, at the intersection of that street with Fourth avenue north. It has now nine tracks and two switch tracks on this crossing, which are in constant use by the cars and engines of respondent, which are constantly passing and repassing, and upon which the company is doing an immense business, running many hundred cars and scores of trains daily. Immediately adjacent to these tracks, and south-east of them, and upon the same street crossing, the Minneapolis and St. Louis Railway Company has, under like charter rights and duties, constructed eight tracks, making in all nineteen tracks upon the crossing, and all laid on the surface of the street. The city of Minneapolis has a population of about 100,000 (now 130,000), many thousands of whom live in what is called North Minneapolis, north and west of the crossing. Fifth street north is one of the main thoroughfares from North Minneapolis to the business center of the city, over which thousands of people and hundreds of vehicles pass and repass daily, this street being the most convenient and shortest route for a large part of the inhabitants of the city between North Minneapolis and the business center of the city. Owing to the condition of the ground, it will be impossible for many years to have good or convenient crossings over these tracks for several blocks west of this crossing.

The great number of cars and engines so occupy this street crossing, and use up so much time in passing and repassing nearly every hour of the day, as to greatly impede, interfere with, hinder and delay the public, and to render travel on Fifth street north very dangerous and unsafe. The street is not now in such condition and state of repair as not to impair or interfere with its free and proper use. The contour of the ground to the north-west of these tracks is such that it is impracticable to carry the street by bridge over

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the railroads. By reason of the premises, it has become necessary, in order to put the street in such condition as not to impair or interfere with its free and proper use, to carry it, by a viaduct, under the railroad tracks, according to a plan prepared by the city council, and made a part of the application for the writ of *mandamus*. This involves the excavation of approaches to the viaduct on either side, on one side commencing at the north-west line of Third avenue north and on the other side at the south-east line of Fifth avenue north; also the construction of supporting walls for the soil along the sides of these excavations, and of abutments for the bridge or viaduct proper, on which to carry the railway tracks.

The city council passed an ordinance authorizing a change of grade of Fifth street north, between Third avenue north and Fifth avenue north, so as to conform to the bottom of the proposed viaduct and approaches. This was passed since the commencement of these proceedings, but as both parties desire a decision on the merits, it was stipulated that no point should be made upon that fact. Of course, the city could not, by changing the grade of a street for some purpose of its own, impose new or additional duties upon the railroad company. Its duty is to be measured by the requirements of its charter. But in this case the sole purpose of the change of grade was to allow the construction of a proposed viaduct, the necessity for which was created by the presence of the railroad in the street. Hence the materiality of the ordinance, if it be material, consists solely in the fact that it gives the authority of the city for the change of grade necessary in the construction of the proposed viaduct. The city council then demanded of respondent that it should construct its share of this viaduct, viz., the part north-west of the dividing line between its tracks and those of the Minneapolis and St. Louis Railway Company, together with the abutments, approaches and sustaining walls on that side. This being refused, the city applied for a *mandamus* to compel the respondent to do it. Similar proceedings have been commenced against the Minneapolis and St. Louis Railway Company to compel it to construct its share on the opposite side.

Whether respondent has in fact complied with the requirements of its charter is a question which neither it nor the city can determine absolutely without the assent of the other. Like all other matters involving a controversy concerning public duty and private right, it is to be adjusted and settled by judicial inquiry and deter-

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mination. *Com. v. Proprietors New Bedford Bridge, supra; Cooke v. Boston & Lowell R. Co., supra.* Hence the decision of the city council is not conclusive upon the questions of the duty of the company to build this viaduct, or that it should be built upon the plan proposed. These are matters, if put in issue, for the determination of the court, upon the hearing. But for the purposes of this appeal, all the allegations of the petition must be taken as true, to-wit, that the street cannot be used by the public with either safety or convenience, with these railroad tracks crossing it on the same grade; that the only way by which the street can be put in such condition "as not to impair or interfere with its free and proper use" is by carrying it under the tracks by viaduct, on the plan proposed. If so, then the duty imposed upon the company by its charter requires them to construct this work, and the whole of it, the abutments and approaches, as well as the bridge for their tracks. Lateral embankments or excavations necessary as approaches to a bridge or viaduct, to carry a street under or over a railway, are as much a part of the work required to be done by the company as the bridge or viaduct itself. Without the approaches, the mere passage way under the tracks would be useless. The one is as necessary to furnish an uninterrupted thoroughfare as the other. The necessity for each is alike created by the construction of the railroad upon the street. The public derives no benefit from either which they did not enjoy before the railroad was built.

The duty imposed by the statute is, at all times and under all circumstances, to put the street "in such condition and state of repair as not to impair or interfere with its free and proper use," and whatever structures are necessary for that purpose must be erected and maintained at the expense of the company. There is no foundation in law or reason for dividing the expense between the company and the city. If the company is bound to build the viaduct under its tracks, it is equally bound to build the necessary approaches.

It is suggested that to make this excavation on Fifth street north would render the railroad company liable as a trespasser for damages to the owners of abutting lots; that the company has no power to exercise the right of eminent domain to take private property for any such purpose, and hence that a *mandamus*, if issued as prayed for, would compel the company to do an illegal act. This seems to have had much weight with the court below, who suggest that

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before the company can be required to build the proposed viaduct, the city should take such action as would relieve respondent from liability for damages resulting from changing the grade of the street. Whether upon the facts of the case, it will be necessary for the railroad company to exercise the right of condemnation, or whether it will be liable to pay compensation to the owners of property abutting on this street, are questions not now before us, and upon which we express no opinion. But if the company has the legal right to do the work, the fact that it would involve the expense of paying compensation to property owners would be no ground for denying the writ. This expense would be just as legitimate a part of the cost of restoring the street as would the expense of making the excavation or building the bridge; and there would be no more reason for imposing this expense upon the public than that of any other part of the work; and if necessary, we have no doubt of the power of the company under its charter to condemn private property for this purpose. The duty imposed carries with it the power to perform it, and in the exercise of that power all other needful auxiliary power given by the charter may be exercised; and of these is the power to take lands compulsorily, when necessary for the purpose of the incorporation. When required by its charter, the construction of this viaduct and approaches for the purpose of carrying the street under its railroad is as much a part of the enterprise authorized by the charter as the railroad bed or track itself, and land taken for the former is as much taken for the purposes of the incorporation as land taken for the latter. *People v. Dutchess, etc., R. Co.*, 58 N. Y. 152; see also *Parker v. Boston & Maine R. Co.*, *supra*.

We wish to remark, in conclusion, that we have found no case which is in all respects exactly like the present one, both on the facts and the language of the statute, but in all the cases, without exception, we find announced certain principles, founded, as we think, in reason and justice, which seem to lead up logically and irresistibly to the conclusion at which we have arrived. The only discordant note that we find in any case is a casual remark, which was mere *obiter*, made in *State v. New Haven & N. Co.*, 45 Conn. 331, 348. But an examination of that case will show that what was there decided is not at all in conflict with our views.

It can hardly be necessary to add that the statute, and what we have said regarding its construction, has reference only to cases

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where the railroad has been constructed in a street, and not to cases where new streets have been laid out over or across the railroad subsequent to its construction.

The order quashing the writ is reversed, and the proceeding remanded. *Order reversed and proceeding remanded.*

GILFILLAN, C. J., dissented.

 DEANE V. HODGE.

(35 Minn. 146.)

Contract — implied — by corporation to pay for use of patent of director.

Where a corporation appropriates and uses a patent owned by one of its directors and officers, with his consent, he is not precluded from recovering compensation upon an implied contract.

CLAIMS against an insolvent corporation. The opinion states the case. The plaintiff had judgment below.

H. J. Horn, for appellant.

C. K. Davis, for respondent.

VANDEBURGH, J. The plaintiff is the patentee of certain improved grain elevators, which were adopted by the defendant's assignors, and manufactured and sold by them in connection with a large number of their harvesting-machines, and which it is claimed were found to be necessary to the successful operation of such machines, and greatly increased their salability and value in the market; and he claims to be entitled to collect and receive of the defendant a reasonable sum of license fee for the use of each of such patented inventions, which is alleged to be \$5 for each machine. He claims under two patents issued to him, the one dated April 27, 1880, and the other dated July 19, 1881, the benefits of each of which it is alleged have since been enjoyed by the corporation. He seeks to recover compensation for the use of the first patented invention upon and in connection with four thousand six hundred and sixty-one of their harvesters, and for the use of the second upon two thousand eight hundred and sixteen thereof. Plaintiff also sues for compensation for special services rendered in

behalf of the corporation in negotiating and contracting for the "Appleby Binder Shop-right," and in securing the collection of royalties on patents owned by the corporation.

1. In respect to the cause of action last mentioned, we think the evidence in plaintiff's behalf fully sustains his right of recovery and the amount allowed by the jury, and this branch of the case may therefore be dismissed without further consideration.

2. It is admitted that the use of the patents by the harvester company was not properly an infringement. It was not tortious, but with the consent of the plaintiff. It also appears that the plaintiff, during the period of such use, was a director of the company, and a part of the time its president, and that after he ceased to be such officer he was, in November, 1881, appointed patent director, for which a compensation was to be fixed. He also had a salary while president. It does not appear however that any compensation was ever fixed or allowed him, as patent director, or that his salary as president was, or was intended to be, compensation for special services in making inventions or improvements, or securing patents. We see nothing in the case necessarily inconsistent with his individual or private right to make such inventions, and secure a patent therefor as his own peculiar property, and to exclude the use thereof by the company without his consent, if he elected to do so. In *McClurg v. Kingsland*, 1 How. 202, relied on by defendant's counsel, the plaintiff's action was for an infringement. The patentee was a laborer employed by the defendants, and while in their employ was engaged in making experiments, which resulted successfully, and on account of which his wages were increased. The circumstances were held to be such as to authorize the jury to presume a license. And to the same effect are *Wilkens v. Spafford*, 3 Ban. & A. Pat. Cas. 274; *Chabot v. American Button-hole Co.*, 9 Phila. 378. It is evident however if in any case a recovery can be had for a use not tortious, and where no compensation is expressly stipulated for, that the question of the patentee's right to recover, in cases where his invention has been used by another with his consent or acquiescence, must be determined upon the facts of each particular case.

The circumstances under which the plaintiff's invention was applied and used, and his relation to the company, were accordingly submitted to the jury by the trial court for their consideration upon the question whether there was an implied understanding that such use was to be for a compensation. And at this point it may be

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well to consider the exception, strongly insisted on and elaborately argued by the counsel for the defendant, to the following legal proposition laid down by the court in the course of its charge to the jury: "And here comes in a very important question in this case, and that is, was there an implied contract here with the Harvester Works to pay a reasonable compensation for the use of these inventions? There is no claim here that there was any express agreement to pay a compensation for that use. It is claimed however that there was an implied contract. Where a party has availed himself of the services or used valuable property of another, such as an invention, the law, in the interest of justice, will imply an agreement to pay a reasonable compensation, unless the circumstances attending such use are of such a character as to justify the conclusion that it was the understanding of the parties that the use was to be gratuitous. A man has a right to render a voluntary service, or give a right to use his property, to another, without remuneration, and if he does, he cannot afterward recover for such services or use of his property, but it does not follow that his mere neglect to demand a specific agreement for compensation, or to forbid the use of his property, necessarily deprives him of his right to a reasonable remuneration. The circumstances however may be such as to show that the understanding of the parties was that the services rendered, or the use of the property was to be without compensation, and in that case the party cannot recover. It is not necessary that there should be any express agreement to that effect; that there should be any express statement in words that they might use it without compensation. The attendant circumstances may be such as to show that such was the understanding of the parties, to the satisfaction of the jury."

In the same connection may be considered the exception of defendant to the refusal of the court to charge, at his request, "that if there was no infringement made, on the part of the company, of the patents in question, the plaintiff cannot recover any royalty or compensation by reason of the St. Paul Harvester Works having used, made, or sold any articles or machines patented by plaintiff, without proving to the satisfaction of the jury that the company agreed to pay said royalty or compensation." The defendant's ninth and tenth requests, bearing on the same subject, present no question not embraced in that just quoted, unless covered by the above general charge of the court.

Where the evidence fails to disclose an express agreement or understanding, the law may imply a contract from the circumstances or the acts of the parties, and where there is nothing from which a contrary intention or understanding is to be inferred, it is a just and reasonable presumption that he who has received the benefit of the services or property of another impliedly undertakes to make compensation therefor. "Implied contracts are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform." 3 Bl. Com. *158; 2 Kent Com. *450; Bouv. Law Dict. "Obligations, implied;" 2 Greenl. Ev., § 108.

A patent is a mere monopoly or exclusive right to an invention, not existing at the common law, but by special grant from the government. The defendant therefore contends, that unless there is an express contract defining the terms of use by a licensee, the patentee is confined to the remedy provided by the patent law for an infringement, by an action on the case for damages, and that there can be no such thing as an implied license for compensation.

There is very little authority on the subject, as the question of implied license has usually arisen in actions for infringement, and as such is for a tortious use or piracy, and the existence of a license, express or implied, is always a sufficient defense. But an action upon a contract, express or implied, for compensation for the use of a patented invention, or for license fees, is not one arising under the patent laws, and notwithstanding the nature of the subject, common-law principles are applicable, as in other cases. Thus in *McClurg v. Kingsland*, *supra*, the court held, that if the facts were as testified, "they would fully justify the presumption of a license, a special privilege, or grant to the defendants to use the invention, * * * and show such a consideration as would support an express license or grant, or call for the presumption of one, to meet the justice of the case, by exempting them from liability; having equal effect with a license, and giving the defendants a right to the continued use of the invention." Here is recognized the principle, that from the circumstances and to meet the justice of the case, a license or grant for a continued use of the invention would be implied. The right to use and profit by a patented invention may then be the subject of contract; and if the evidence of an express contract is wanting, it may be implied, as in other cases, and for the same reasons; and if *assumpsit* will lie upon ex-

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press contract to recover reasonable license fees or compensation, it may also be maintained upon implied contract, though from the nature of the subject and the circumstances of any particular case, the question may be involved and difficult of solution. See Walk. Pat., § 312; *De Witt v. Elmira Nobles Mfy. Co.*, 66 N. Y. 459. In *McKeever v. U. S.*, 14 Ct. Cl. 396, it was held that where the patentee had allowed the defendant to proceed in the manufacture and use of a patented invention or article "without the formality of an express license, or the precaution of an express consideration, the omission did not change the character of the transaction, for the law supplies, by implication, a price in giving what the license was reasonably worth." The case was well considered, and was afterward affirmed by the Supreme Court of the United States. Walk. Pat., § 391.

Recurring again to the question of the relationship of the plaintiff to the defendant as president or director, at the time, as affecting his cause of action, it was held in *Rogers v. Hastings & Dakota Ry. Co.*, 22 Minn. 25, that the defendant corporation, of which the plaintiff was a director, might be held liable upon an implied *assumpsit* to pay the reasonable value of services rendered for defendant outside of his duties as director. He could not, as director, aid by his vote in fixing the amount of such compensation, for in that case there would be a conflict of interests inconsistent with his official duty. *Jones v. Morrison*, 31 Minn. 140, 148. But the rule is not, as we understand it, to be carried so far as to prevent the corporation from availing itself of the services or property of an officer of the company, "if necessary for its convenience or profit, as in the case of other persons, under circumstances implying a contract to pay a reasonable compensation therefor." *Rider v. Union India Rubber Co.*, 5 Bosw. 85, 97. All such dealings are, of course, looked upon with jealousy by the courts, and the fact of such official relationship, and the interest of the officer in the affairs and property of the corporation, would figure prominently in determining the question of fact whether or not a contract for a compensation is to be implied. *Gardner v. Butler*, 30 N. J. Eq. 702.

Upon the directors was imposed the duty and authority, which was exercised by them, of determining the character and number of the machines to be manufactured. The improvement was appropriated and used by them, or under their direction, on behalf of the company; and the continued acquiescence of the corporation

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for several years sufficiently indicates its approval. *Rider v. Union India Rubber Co.*, 5 Bosw. 85, 96.

[Minor points omitted.]

Order affirmed.

 PARKINSON V. BRANDENBURG.

(35 Minn. 204.)

Statute — time of taking effect.

Where a statute provides that it shall take effect "from and after its passage," in computing the time when it takes effect the day of its passage is to be excluded.

CONVERSION. The head-note states the point. The plaintiff had judgment below.

John P. Williams, for appellant.

E. E. Corliss, for respondent.

MITCHELL, J. The question here is whether the levy made on February 27, under writs of attachment issued out of justice's court, was dissolved by the assignment under the insolvent law, executed March 2, by the defendants in the writs, Johnson & Dahl. This involves the question whether chapter 70, Laws 1885, took effect on the 27th or on the 28th of February. The act was passed February 27, and was, by its terms, to "take effect, and be in force, from and after its passage." In *Duncan v. Cobb*, 32 Minn. 460, this court, in considering a statute which was to take effect "one year from and after its passage," held that in computing this period of one year the day of the passage of the act should be excluded. This would seem to be decisive of the present case. But as the point was decided without much consideration, and was not necessarily involved in the determination of the case, we would not feel compelled to adhere to this rule, if on fuller consideration we were convinced that it was wrong.

Undoubtedly the great weight of authority is to the effect that a statute which is to take effect "from and after its passage," takes effect upon the day of its passage. *Arnold v. U. S.*, 9 Cranch, 104; *Matthews v. Zane*, 7 Wheat. 164, 211; *Mallory v. Hiles*, 4 Metc. (Ky.) 53; *People v. Clark*, 1 Cal. 406. The reason usually

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assigned for this is that it is in accordance with the general rule that when a computation of time is to be made from an act done, the day on which the act is done is to be included. *Arnold v. U. S.*, *supra*; *Mallory v. Hiles*, *supra*. And yet the general and now prevailing rule is that where the computation of time, as prescribed in statutes, is to be made from an act done, the first day — that on which the act is done — is to be excluded. Sedg. Stat. Law, 356; Smith Com., § 616; *Bigelow v. Willson*, 1 Pick. 485.

How this rule is to be reconciled with that suggested in *Arnold v. U. S.* and *Mallory v. Hiles*, *supra*, we have never been able clearly to understand. It may well be doubted whether any inflexible rule can be laid down as of universal application to all classes of cases. The word "from" may in vulgar use, and even in strict propriety of language, mean either "inclusive" or "exclusive." It must always depend upon the context and subject-matter whether it shall be inclusive or exclusive of the *terminus a quo*. *Pugh v. Duke of Leeds*, Cowp. 714, 719. It seems to us that the words "from and after," as used by the legislature in this connection, are words of exclusion. And if a day is to be deemed an indivisible point of time, and in accordance with the general rule, fractions of a day disregarded, it logically follows that the day of the passage of the act should be excluded. The expressions "from its passage" and "from the day of its passage," like the expressions from the "date" and "from the day of the date," are synonymous (*Bigelow v. Willson*, *supra*; *Pugh v. Duke of Leeds*, *supra*); and if a day is an indivisible point of time, there can be no distinction between a computation from an act done and a computation from the day on which the act was done.

It therefore seems to us that when a legislature declare that an act shall take effect "from and after its passage," or "from and after the day of its passage," it may be fairly presumed that they use these terms as exclusive of the day of the passage of the act. This furnishes a certain and convenient rule, which avoids serious practical difficulties resulting from holding that the day of the passage of the act is to be included. Some of the authorities which hold that such a statute takes effect on the day of its passage, take the position that it is to be deemed in force from the earliest moment of that day, and that any inquiry as to the exact hour of its passage is inadmissible. In *Matter of Welman*, 20 Vt. 654; *Mallory v. Hiles*, *supra*. But it would seem wrong in principle

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that laws designed as rules of conduct should be, by a mere legal fiction, made retroactive, even for a fraction of a day. To avoid this result the tendency now is to hold that the statute takes effect only from the exact moment of its approval, and that when necessary to determine conflicting rights, courts of justice will inquire as to the exact hour of its passage. *In Matter of Richardson*, 2 Story, 571; *People v. Clark*, *supra*; *Louisville v. Savings Bank*, 104 U. S. 469.

The objection to this is that while all right in theory, it is difficult of application in practice. There is usually no satisfactory means of ascertaining the exact hour at which the executive approved any given statute. The question must generally be decided on mere conjecture, or by indulging in presumptions, as in *Kennedy v. Palmer*, 6 Gray, 316. It certainly does not seem fit or proper that the time of the commencement of a law, whenever the question arises, should be left to depend upon the uncertainty of parol proof, or upon any thing extrinsic to the law itself and the authenticated recorded proceeding in passing it. By excluding the day of the passage of the act, and holding that it takes effect at the beginning of the following day, all these practical difficulties are avoided, and a rule established which is not only certain and convenient, but as we think, entirely in accord with recognized canons of construction. It is also in harmony with the usual method of computing time in other cases. We therefore see no good reason for receding from the rule laid down in *Duncan v. Cobb*, *supra*.

It is not necessary to consider whether the legislature could, by making this statute retroactive, have affected attachment liens acquired prior to its passage. It is sufficient here to say that statutes are not to be construed as retroactive unless by their language it clearly appears that they were so intended to be. No such intent appears from the language of this act.

Order reversed.

Elliot v. Small.

ELLIOT V. SMALL.

(25 Minn. 386.)

Deed—reservation for street.

A warranty deed granted a parallelogram of land, nine chains and ninety-six links long, by five chains and two links wide, "containing five acres, * * * * * reserving from said grant a strip thirty-three feet in width, on the south side of said tract for a public street." *Held*, that the fee of the thirty-three feet strip passed to the grantee.

EJECTMENT. The head-note states the point. The defendant had judgment below.

Shaw & Cray, for appellant.

Hart & Brewer, for respondents.

BERRY, J. The warranty deed involved in this case granted and conveyed "all the following described piece or parcel of land, * * * viz.: Beginning at the north-east corner of section thirty-four; * * * * * thence westerly, on the section-line, nine chains and ninety-six links; thence southerly five chains and two links; thence easterly nine chains and ninety-six links; thence northerly five chains and two links, to the place of beginning, containing five acres; * * * reserving from said grant a strip thirty-three feet in width, on the south side of said tract for a public street, and a strip thirty-three feet in width on the east side, which is now used and occupied as a public road and highway." The parallelogram of land thus described, nine chains and ninety-six links by five chains and two links, contains just five acres, the quantity specified in the deed. The description is precisely that which is appropriate to the conveyance of the entire five-acre tract; whereas, if the intention had been to exclude from the grant a strip thirty-three feet wide off of the south side of the five-acre tract, then inasmuch as the description is by distances, or dimensions of length and width, the more obvious, simple and natural way of exclusion would have been to describe the tract intended to be conveyed as being thirty-three feet narrower than the tract in fact described, that is to say, as being four chains and fifty-two links, instead of five chains two links in width.

It is difficult to see why, when he had adopted the plan of describing the property by its width in chains and links, the grantor should have specified a width greater than the actual width of the premises which he intended to convey, or why he should have embraced in the specified width thirty-three feet more than he intended to convey, simply for the purpose of taking it out again. The obvious and natural construction is that he meant to convey all that he described as a five-acre tract, nine chains ninety-six links long, by five chains two links wide.

This being the apparent intention of the grantor in his description of the five-acre tract, how is it affected by the so-called reservation? Certainly that does not operate to except from the tract the fee of the thirty-three feet strip on the south side, for this would be inconsistent with the intention mentioned (if not repugnant and therefore void), but to reserve an easement of right of way for a public street in and over the strip. As it did not except the fee, and the strip had never been used as a street, and no street had ever been laid out or opened upon it at the time of the grant, the so-called reservation was not, strictly speaking, an exception of any thing, for an exception is of a part of the thing granted, and of something in *esse* at the time of the grant. A reservation is defined to be something newly created or reserved out of the thing granted, that was not in *esse* before, as for instance an easement. *Hurd v. Curtis*, 7 Metc. 94; *Winthrop v. Fairbanks*, 41 Me. 307; *Boone Real Prop.*, § 303. So that although the terms "exception" and "reservation" are often used indiscriminately, and the difference between them is in particular cases sometimes obscure and uncertain (*Bowen v. Conner*, 6 Cush. 132, and cases *supra*; *Roberts v. Robertson*, 53 Vt. 690; s. c., 38 Am. Rep. 710), the so-called "reserving" of the thirty-three feet strip in this case, "for a public street," would be a reservation proper (if any thing), as distinguished from an exception, properly so called. And right here, and upon this point, it is important to observe that the strip is reserved "for a public street." If the grantor intended to except the fee of the strip from the grant, his intention was not expressed. The strip is "reserved" for a public street, and for nothing else. This does not require the exclusion of the fee of the strip from the grant, but only an easement; and upon the principle that a grantor's deed is to be taken most strongly against himself, no such exclusion of the fee is to be implied.

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Our construction of the deed then is that it passed to the grantee the fee of the whole of the five-acre tract. *Peck v. Smith*, 1 Conn. 103; s. c., 6 Am. Dec. 216; *Richardson v. Palmer*, 38 N. H. 212; *Tuttle v. Walker*, 46 Me. 280; *Kuhn v. Farnsworth*, 69 Me. 404; *Hays v. Askew*, 5 Jones Law, 63; *City of Cincinnati v. Newell*, 7 Ohio St. 37.

Whether the reservation was of no effect, because it was to a stranger, and not to the grantor, as held according to the old common law (*Hornbeck v. Westbrook*, 9 Johns. 73), or whether it is valid in favor of the public, as appears to be held or intimated in *Tuttle v. Walker* and *City of Cincinnati v. Newell*, *supra*, is a question with which the case at bar would appear to have no particular concern.

Order affirmed.

MORRISON V. PORTER.

(35 Minn. 425.)

Evidence — handwriting — comparison of hands.

Upon an issue as to the genuineness of a handwriting, other instruments admitted to be genuine, but not otherwise relevant, may be received in evidence for the purpose of comparison.*

ACTION to determine claims to land. The head-note states the point. The plaintiff had judgment below.

P. M. Babcock, for appellant.

John D. Howe and *S. L. Perrin*, for respondents.

DICKINSON, J. The defendant, the railroad corporation, has title to the land in controversy through a chain of conveyances running back to the plaintiff, if in fact the plaintiff executed a certain deed of conveyance in the year 1860, the execution of which the plaintiff disputes. The court found that it had been executed by her. The first point to be considered arises upon the admission in evidence of an instrument (Exhibit Y) containing a signature of the plaintiff admitted to be genuine, to enable a comparison to be made between that signature and the disputed signature in issue, Exhibit Y being not otherwise relevant to the issue. Expert witnesses were allowed

*See *Benedict v. Flanigan* (18 S. C. 506), 44 Am. Rep. 583.

to give their opinions, based upon such comparison. Upon the question thus presented, as to whether a writing, admitted to be in the hand of the person whose signature is in issue, may be received in evidence for the purpose of comparison, the authorities are so at variance that we are at liberty to adopt the rule of evidence which seems to be most consistent with reason and conducive to the best results. At common law, and generally in the United States, it has been the rule that where other writings, admitted to be genuine, are already in evidence for other purposes in the case, comparison may be made between such writings and the instrument in question. If such a comparison is conducive to the ends of truth and is allowable, there would seem to be but little reason for refusing to allow a comparison with other writings admitted to be genuine, although not in evidence for other purposes.

The objections which have been urged to receiving other instruments for the purpose of comparison have been the multiplying of collateral issues; the danger of fraud or unfairness in selecting instruments for that purpose, from the fact that handwriting is not always the same, and is affected by age, and by the various circumstances which may attend the writing, and the surprise to which a party against whom such evidence is produced may be subjected. When the writings presented are admitted to be genuine, so that collateral issues are not likely to arise, nor the adverse party to be surprised by evidence which he is unable to meet, these objections seem to us to be insufficient as reasons for excluding the evidence. If such evidence has apparent and direct probative force, it should not be excluded unless for substantial reasons. In general, and from necessity, the authenticity of handwriting must be subject to proof by comparison of some sort, or by testimony which is based upon comparison, between the writing in question and that which is in some manner recognized or shown to be genuine. This is everywhere allowed, through the opinion of witnesses who have acquired a knowledge, more or less complete, of the handwriting of a person, as by having seen him write, or from acquaintance with papers authenticated as genuine. In such cases the conception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed and given in evidence. It would seem that a standard generally not less satisfactory and very often much more satisfactory, is afforded by the opportunity for examining, side by side, the

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writing in dispute and other writings of unquestioned authenticity; and this, we think, is in accordance with the common judgment and experience of men.

The evils that may be suggested as likely to arise from the selection of particular writings for the purposes of comparison may be left, as all unfair or misleading evidence must be, to be corrected by other evidence, and by the intelligent judgment of the court or jury. In our opinion, such evidence is conducive to the intelligent ascertaining of the truth, and the receiving of it in this case was not error. We cite authorities sustaining this view, some of which go further in this direction than does our present decision. *Tyler v. Todd*, 36 Conn. 218; *Moody v. Rowell*, 17 Pick. 490; s. c., 28 Am. Dec. 317; *State v. Hastings*, 53 N. H. 452; *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110; *Travis v. Brown*, 43 Penn. St. 9; *Chance v. Indianapolis & W. G. R. Co.*, 32 Ind. 472; *Macomber v. Scott*, 10 Kans. 335; *Wilson v. Beauchamp*, 50 Miss. 24.

[Minor points omitted.]

Order affirmed.

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(35 Minn. 422.)

Insurance — "contiguous."

A building twenty-five feet from another is not "contiguous" to it.

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

Lusk & Bunn, for appellant.

Cross, Hicks & Carleton, for respondent.

VANDEBURGH, J. The defendant seeks to defeat a recovery in this action, on account of a breach of one of the conditions in a policy of insurance issued upon the dwelling-house of plaintiff, which runs as follows: "If the risk shall be increased by the erection or use of any building contiguous thereto * * * without the consent of this company indorsed thereon, then and in every such case, this policy shall be null and void." In respect to an

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alleged breach of this condition, the court finds, that subsequent to the issuance of the policy, a cooper-shop was erected and operated at a distance of twenty-five feet from the building insured, and that the risk was thereby greatly increased, and that the loss in question resulted from fire communicated from such shop, and that the defendant never consented to the erection of the shop, and received no notice thereof from the plaintiff. It further appears that the plaintiff did not own the land upon which the shop was built, and that a strip of land ten feet in width between the insured property and the shop was owned by a stranger.

The increased risk does not appear to be due to any act of the assured, and the condition under consideration avoided the policy only for increased risk caused by the erection of a building contiguous to the insured property. In the judgment of the trial court the shop was not contiguous to the dwelling insured, under a proper interpretation of the terms of the policy. This construction is, we think, the correct one. It may be that the insurance company intended, by the language used, to include a case like this, because the new building was sufficiently near to greatly increase the hazard to the insured dwelling, though not closely joined to it. It is a well-settled rule of construction that the language of a condition in a policy, being that of the underwriters, and selected by them, must be clear and unambiguous, and any doubt as to its meaning must be resolved in favor of the policy-holder. *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; s. c., 18 Am. Rep. 385; *Loy v. Home Ins. Co.*, 24 Minn. 315; *Cargill v. Millers', etc., Ins. Co.*, 33 Minn. 90.

The situation of the buildings in question was not such as to warrant the court in adjudging them to be "contiguous." The term must be given its proper definition and meaning, as commonly received and understood, to the end that policy-holders may not be misled or left in doubt as to their duty. See *Webst. Dict.*, "Contiguous" and "Adjacent." Plaintiff's building was separated and detached from other buildings when insured. It in fact remained so when destroyed. But the defendant insists that the term "contiguous," as here used, does not mean merely adjoining, or in immediate proximity, but that it is also applicable to objects "near by," and that upon the facts of this case, it should be held that the shop was sufficiently near to be within the condition. This construction is not admissible. The matter would be left altogether too doubt-

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ful and ambiguous for the protection of the assured. We cannot hold that a building twenty-five or any particular number of feet from a detached dwelling is contiguous to it. *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191; s. c., 25 Am. Rep. 168; *Hill v. Hibernia Ins. Co.*, 10 Hun, 26. If the company intended to terminate the policy in consequence of the erection of a building within a certain distance of the insured property without its permission, it should have plainly so indicated, by defining the distance, or by the use of appropriate terms.

Judgment affirmed.

WILSON v. DUBOIS.

(85 Minn. 471.)

Slander — of property — damage.

A false and malicious publication that a horse was twenty-one years old, when the defendant knew him to be only twelve, is actionable on proof of special damages, but the loss of sale to some particular person must be averred and proved.

ACTION of slander of property. The head-note states the case. The defendant had judgment below on demurrer.

C. H. Benton, for appellant.

Arthur D. Smith, for respondent.

BERRY, J. The complaint alleges that plaintiff, a horse-dealer, owned, on January 30, 1886, and still owns, a race-horse, which then was and still is for sale; that on that day defendant maliciously published in a newspaper (of large circulation), of which he was proprietor, a statement that the horse was twenty-one years old, when he was not more than twelve years old, as defendant well knew, thereby intending to hinder the sale of the horse by plaintiff, to his pecuniary loss and damage; that at said time plaintiff had "a chance to sell, and was negotiating a sale" of said horse for \$1,000, and but for said false publication would have sold him for that sum; and that solely because of said false publication, "plaintiff lost the chance to sell said horse; the negotiations * * * were broken off by said parties who contemplated purchasing; no

one will pay for it more than \$500; and plaintiff cannot sell his said horse for more than \$500;" and that plaintiff has accordingly suffered damages in the sum of \$500.

False and malicious statements, disparaging an article of property, when followed, as a natural, reasonable and proximate result, by special damage to the owner, are actionable. *Paul v. Halferty*, 63 Penn. St. 46; *Gott v. Pulsifer*, 122 Mass. 235; s. c., 23 Am. Rep. 322; *Starkie Sland.* (Wood's ed.), § 136; *Manning v. Avery*, 3 Keb. 153; *Broom Com.* (6th ed.) 761; *Swan v. Tappan*, 5 Cush. 104; *Western C. M. Co. v. Lawes C. M. Co.*, L. R., 9 Exch. 218; *Odgers Lib. and Sland.* *145; *Townsh. Sland.*, § 204.

Does the complaint state a case under this rule? That the statement complained of was false and malicious is distinctly averred. It was also *prima facie* disparaging, for *prima facie*, as a matter of common knowledge, a horse twenty-one years of age is less valuable than he is at twelve. The complaint also alleges, in effect, that the plaintiff's loss of sale of his horse was the result of the publication; and there is no difficulty in conceiving of a state of facts showing that the intending purchaser was influenced and led to decline or refuse to purchase by the publication complained of, and hence no difficulty in conceiving that the failure to sell to him may have been a natural, reasonable and proximate consequence of said publication. But the allegation of special damage is insufficient. The action is in the nature of one for slander of title (*Western C. M. Co. v. Lawes C. M. Co.*, L. R., 9 Exch. 218), and hence it is not the ordinary action for slander, properly so called, "but an action on the case for special damages sustained by reason of the speaking" complained of. 1 Wms. Saund. 243e, note n; *Malachy v. Soper*, 3 Bing. N. C. 371; *Brook v. Rawl*, 4 Exch. 521. Special damages are therefore of the gist of the action. *Wetherell v. Clarkson*, 12 Mod. 597. Without them the action cannot be maintained, and therefore a complaint failing to allege them fails to allege a cause of action. *Starkie Sland.* 212; *Wetherell v. Clarkson*, *supra*; *Cook v. Cook*, 100 Mass. 194.

Where loss of sale of a thing disparaged is claimed and relied on as special damages occasioned by the disparagement, it is indispensable to allege and show a loss of sale to some particular person, for the loss of a sale to some particular person is the special damage, and of the gist and substance of the action. 1 Rolle Abr. 58; *Manning v. Avery*, 3 Keb. 153; *Tasburgh v. Day*, Cro. Jac. 484;

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Evans v. Harlow, 5 Q. B. 624; *Tobias v. Harland*, 4 Wend. 537; *Kendall v. Stone*, 5 N. Y. 14; *Swan v. Tappan*, 5 Cush. 104; *Linden v. Graham*, 1 Duer, 670; *Hartley v. Harring*, 8 T. R. 130; *Hallork v. Miller*, 2 Barb. 630; *Malachy v. Soper*, *supra*; *Ashford v. Choate*, 20 U. C. C. P. 471; 3 Suth. Dam. 674; *Stiebeling v. Lockhaus*, 21 Hun, 457; *Cramer v. Cullinane*, 2 McArthur, 197; *Bergmann v. Jones*, 94 N. Y. 51; *Bassell v. Elmore*, 48 N. Y. 561; *Cook v. Cook*, 100 Mass. 194; *Pollard v. Lyon*, 91 U. S. 225; Odgers Libel and Sland. 313; Starkie Sland. (Wood's ed.), § 136; *Wetherell v. Clarkson*, *supra*; *Swan v. Tappan*, *supra*; *Paull v. Hafferty*, *supra*; *Gott v. Pulsifer*, *supra*; and see declarations or complaints in many of the foregoing cases, especially the two last cited.

The rule is not technical, but substantial. It imposes no hardship upon the plaintiff. If there is a person to whom a sale could have been made, in the absence of the disparagement, he can be named, so as to inform defendant of the particular charge of damage which he is required to meet. *Wetherell v. Clarkson*, *supra*. If there is no such person, there is no cause of action; and it follows that the failure to name the particular person or persons to whom a sale could have been effected, if it had not been prevented by the disparagement, does not present a case of mere indefiniteness, but of total absence of an allegation essential to the statement of a cause of action, a lack of substance, not of form (*Cook v. Cook*, *supra*; *Pollard v. Lyon*, *supra*), and therefore a case for a demurrer, rather than for a motion to make more definite and certain. Pom. Rem., § 549.

Order affirmed, and case remanded for further proceedings

EMERSON V. PETELER.

(35 Minn. 481.)

Negligence — injury to child by cars in grading street.

The defendant, a contractor for grading a city street, employed cars in transporting earth in that work. A young child climbed upon one of the cars to ride, and jumped or fell off and was killed. *Held*, that the defendant was bound only to ordinary care; was not bound to keep a watchman to prevent such occurrences, and was not liable.*

* See *Gulline v. Lowell*, *ante*, 102, and note, 104.

ACTION for death of plaintiff's son by negligence. The opinion states the case. The appeal was from an order setting aside a verdict for plaintiff and granting a new trial.

Erwin, Ryan & Ives, for appellant.

W. E. Hale, for respondent.

VANDENBURGH, J. This action is brought to recover damages for personal injuries resulting in the death of the plaintiff's son, alleged to have been caused by the defendant's negligence. At the time of the accident, and for several months previous thereto, the defendant was engaged, under a contract between himself and the municipal authorities of the city of St. Paul, in grading L'Orient street, in that city, and in so doing was required to excavate that portion of the street north of Glencoe street, which it crosses, including Mt. Airy street, which connects with it on an elevated ground. The earth so excavated was transported by small portable dump cars. There was a double track laid in the street, and the ascent from Glencoe street to Mt. Airy street was such that the momentum of the loaded cars in their descent was sufficient to draw the empty cars back upon the opposite track, to be reloaded. The descending loaded cars were let down, four at a time, by a wire cable controlled by a "man with a brake" at the junction of Mt. Airy street. The cars were stopped near Glencoe street, where the cable was unhitched by the person in charge at the lower end of the line, and were propelled by hand-power slowly for a short distance, and were then hauled by horses to the dumping place, a considerable distance north of Glencoe street. The business appears to have been managed in the usual way at the time of the accident. The boy who was killed was five years old. Without the knowledge of his mother, in whose care he was, he accompanied his sister, who was ten or eleven years of age, into the street, and coming to L'Orient street, they climbed upon the bumper in front of one of the loaded cars, then at or near Glencoe street, to ride. The cars were started, and before they stopped the girl jumped off, and then the boy either jumped or fell off, and was killed. It does not appear that the children were seen by any of defendant's employees in time to have prevented the accident, or that there was any negligence in the management of the cars or in conducting the business. Defendant's employees had been previously annoyed by the presence of

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boys from the vicinity seeking to ride on the loaded cars as they descended the hill to Glencoe street, and he had given orders to them not to allow any one to ride on the cars, and residents in the neighborhood had been warned not to allow their children to do so. These children had been particularly warned and cautioned not to go near these cars. No previous accident of the kind had occurred. The only ground upon which negligence is predicated in this case, as we understand it, is the failure of the defendant to provide better police supervision of the movement of the cars in order to prevent children from boarding them under the temptation to ride.

It is urged by counsel for the plaintiff, that if the children had understood that there was a watchman there whose special business it was to keep them off, they would not have attempted to get on the cars, and that the mere fact that the men who were engaged about the work ordered them off when they were seen, their attention being occupied with their employment, only sharpened the impulses of the children to ride when they were not observed. But we do not think that the law required the defendant, under the circumstances, to provide police supervision to keep off intruders or trespassers from these cars, whether children or adults. He was engaged in improving the street, and his cars and track were lawfully in it for such purpose. For aught that appears, the cars were properly constructed and carefully managed. The nature of the work, and character of the cars, and manner in which they were operated, were patent. There was no danger to persons crossing the street, and no warning of their approach was needed. We discover no evidence in the case tending to prove negligence on the part of the defendant in conducting this work. Defendant's management, and all the arrangements for moving these cars, were reasonably safe as respects danger to persons using ordinary care. This was the measure of defendant's duty. *Gavin v. City of Chicago*, 97 Ill. 66, 71; *Hestonville Pass. Ry. Co. v. Connell*, 88 Penn. St. 520; s. c., 32 Am. Rep. 472; *Gillespie v. McGowan*, 100 Penn. St. 144, 150, 151; s. c., 45 Am. Rep. 365. Where there is no negligence, the incapacity of a child who happens to be injured cannot create any liability. *Kay v. Penn. R. Co.*, 65 Penn. St. 269, 276. The burden rested on the plaintiff to establish defendant's negligence, and it is not claimed that there was any, unless the failure to employ sufficient help to watch and keep children away was

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such. But the duty which defendant owed these children was not to keep constant watch, or to use extraordinary care to prevent their approach, but when discovered in the exercise of ordinary care, to use proper diligence to prevent any injury to them. *Scheffler v. Minn. & St. L. Ry. Co.*, 32 Minn. 518.

Keffe v. Mil. & St. Paul Ry. Co., 21 Minn. 207; s. c., 18 Am. Rep. 393, is invoked by plaintiff in support of his position. The defendant in that case was held guilty of negligence in leaving a turn-table unfastened, because it was a place where children were induced to amuse themselves by putting it in motion when not fastened. The premises were such as to invite their presence, and the danger was not apparent, but concealed. But in *Kolsti v. Minn. & St. L. Ry. Co.*, 32 Minn. 133, where a child of eight years went on a turn-table to play, and displaced the fastening himself, which was of the ordinary kind, and put the table in motion and was injured, the company was held not liable, because they had used reasonable care, and they owed no further duty to any one in the premises.

Order affirmed.

FOLLMAN V. CITY OF MILWAUKEE.

(35 Minn. 522.)

Negligence — imputable — of driver of private carriage.

SUFFICIENTLY reported, 57 Am. Rep. 488.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CHICAGO AND EASTERN RAILROAD COMPANY V. LOEB.

(118 Ill. 208.)

Damages — future — eminent domain.

Where adjoining lots are injured by the construction and operation of a railroad in a city street, the right of action vests in the owner of the lots at the time of the construction, and a subsequent grantee cannot recover for injury by the proper use and operation of the railroad. (*See note, p. 851.*)

ACTION for nuisance. The opinion states the case. The plaintiff had judgment below.

William Armstrong, for appellant.

H. O. McDaid, for appellee.

SHELDON, J. This was an action on the case brought by Adolph Loeb against the Chicago and Eastern Illinois Railroad Company, on June 9, 1880, in the Superior Court of Cook county, to recover damages sustained from the operation of defendant's railroad by throwing smoke, cinders and ashes upon plaintiff's premises. Upon a trial by the court, without a jury, there was judgment for the plaintiff for \$1,200, which was affirmed by the Appellate Court for the first district, and the defendant appealed further to this court.

The declaration avers, that plaintiff was the owner of three certain lots in Chicago, with the buildings thereon, which were used

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for dwellings, and that defendant wrongfully and unjustly maintained and operated near by plaintiff's property divers railway tracks and switches upon the streets within ten feet of the property; "that steam engines have passed and repassed along the property, and in doing so have unlawfully and unjustly caused to be thrown and deposited in and upon plaintiff's property large quantities of smoke, cinders, dust, soot, ashes, sparks of fire and other substances, and in operating the same they greatly disturbed and vibrated the buildings; that by reason of the close proximity to said premises, the defendant has constantly thrown and deposited upon plaintiff's property smoke, cinders, soot, dust and ashes, and other substances, which greatly damaged the same and depreciated the value of the property." There were two pleas — the general issue, and the statute of limitations of five years.

The following facts appear: The Chicago, Danville and Vincennes Railroad Company was created by a private charter February 16, 1865, and during the year 1872, under its charter and the permission of an ordinance of the city of Chicago, it built a railroad on the west side and on one of the public streets. It used the same as a railroad until April, 1877, when all its property in this State was sold under a mortgage foreclosure to Messrs. Huidekoper, Denison & Shannon, who afterward conveyed the same to the Chicago and Nashville Railroad Company, which company consolidated with the State Line and Covington Railroad Company, creating the Chicago and Eastern Illinois Railroad Company, the defendant. The plaintiff, during the year 1876, purchased the three lots in question, being seventy-five feet on May street and one hundred and twenty-five feet on Carroll avenue, near the said railroad, which railroad had been in constant operation since 1872, and on the lots there were four tenement-houses at the time of his purchase. After he purchased the lots, the plaintiff purchased two more houses and moved them on the lots, making then six houses on the lots. The plaintiff rented the houses to tenants, and the same have, ever since he became the owner thereof, been occupied by his tenants.

At the trial the defendant submitted to the court the following proposition of law: "The plaintiff in this case having purchased the property described in the declaration, after the railroad was built and in operation, he cannot recover in this action for the matters stated in the declaration, for the reason that the entire cause of action for which he is now suing was in his grantor, and it makes

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no difference whether his grantor sued for the same or not." The court refused the proposition, and the defendant took exception. The soundness of the above proposition is to be considered.

The position taken by appellee is, that the operating of the railway caused a private nuisance to his property; that the construction of the railroad was lawful, and produced no damage, but that the operation of the railroad was the sole cause of the injury, and that in such case, where the structure in itself does not cause damage, but its use, then the damage arising from its use is the cause of action; that the grantee of premises upon which a nuisance is erected is liable for damages ensuing from his maintenance of it, because every day's continuance of a nuisance is a new nuisance.

There is quite a weight of authority to the effect, that one may bring suit for the deterioration in value of real property from a nuisance, alleging its permanency, and that by such an action the plaintiff consents to the continuance of the nuisance and accepts the judgment recovered as a compensation therefor, that such recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance, as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain. *Suth. Dam.*, § 3, pp. 413, 414. Thus in *E. L. & B. S. R. Co. v. Combs*, 10 Bush, 393; s. c., 19 Am. Rep. 67, the action was for the throwing of smoke, cinders and ashes on premises, and the court in speaking of the right to a subsequent recovery, which was denied, say: "We have heretofore held in actions for injury to real estate by trespassers, that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in case of injuries not continuing and permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of." And in *J. M. & I. R. Co. v. Esterel*, 13 Bush, 669, which was also an action for the throwing of smoke, cinders and ashes on land, the court say: By instituting this action for damages, the lot owner, in effect, consents that the railroad company may continue for all future time to use the street as it is now using it, and as consideration therefor to accept such judgment as may be therein rendered. In *C. B. U. P. R. Co. v. Andrews*, 26 Kans. 711, an action to recover damages for interference with an alley, it is said by court, upon this point: "The plaintiff has chosen to consider the obstruc-

tion of the alley as a permanent injury to his lots, as a *quasi* condemnation and permanent taking and appropriation of a certain interest in his property. * * * It seems to us that he gives his consent (that his property shall be permanently appropriated) when he brings an action for such damages. It seems to us that he then consents that the railroad company shall permanently appropriate his property in the alley, for he then brings his action for damages because of such appropriation." In *Fowle v. N. H. & N. R. Co.*, 112 Mass. 334; s. c., 17 Am. Rep. 106, where the action was for damages caused by the building of a railroad in such a manner that at times the current of a certain stream would be thrown upon the plaintiff's land, the court say: "And if it (injury) results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury." And see *Town of Troy v. Cheshire R. Co.*, 3 Foster, 33; *Powers v. City of Council Bluffs*, 45 Iowa, 652; s. c., 24 Am. Rep. 792; *Kansas R. Co. v. Muhlman*, 17 Kans. 224.

It has frequently been held by this court, that in an action brought for deterioration in the value of real estate, from a nuisance of a permanent character, all damages for past and future injury to the property may be recovered, and that one recovery in such action will be a bar to all future actions for the same cause. *Ottawa Gas Co. v. Graham*, 28 Ill. 73; s. c., 81 Am. Dec. 263; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 242; *Cooper v. Randall*, 59 Ill. 321; *Decatur Gas Co. v. Howell*, 92 Ill. 19; *Chicago & Alton R. Co. v. Maher*, 91 Ill. 312. The latter was an action of much the same character as the present. It was an action of trespass for damage to the premises of an adjoining land owner, by the construction and operation of a draw railroad bridge across the Chicago river, on which plaintiff's property abutted, and which was used as dock property. After the bridge was constructed, and had been in operation for considerable time, Maher, who was the owner when the bridge was built, sold the premises to the plaintiff in the suit, who was his wife. The same question was presented there as here, whether the plaintiff might recover for damages she had sustained by the continuance of the obstruction since she purchased. The solution of the question was found by the court in the determination that the character of the cause of injury was such, from its permanency, that one recovery would be a bar of all future actions growing out of the erection of the struct-

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ure; that Maher, the original owner, might have sued for and recovered all the damages which were sustained by the property from the erection, whether at the time or in the future; that that being true, the right of action was in him for a recovery of all damages that were or might be caused by the structure, and as that right could not be transferred to his grantee, the plaintiff, there was in her no right of recovery. The distinction which appellee's counsel draws in that case, that it was one of trespass, some piles in the protection of the bridge having been actually driven in Maher's land, does not make a satisfactory discrimination. There is no significance in that action having been one of trespass and not case, as our statute has abolished all distinctions between the actions of trespass and trespass on the case. The decision was not rested upon the point of that act of trespass committed being the only cause of action, but upon the permanent character of the structure, as giving a right of recovery once for all, and the continuance of the obstruction since the purchase by the plaintiff being urged as ground of recovery in the case, was met by the court in the manner above stated.

If the above doctrine as to entireness of recovery in one action, where the cause of injury is of a permanent kind, is to be admitted, it should apply peculiarly in this character of case. The cause of damage here is not a nuisance proper.

A railroad track laid upon a street of a city by authority of law, properly constructed, and operated in a skillful and careful manner, is not, in law, a nuisance. *Randle v. Pacific R. Co.*, 65 Mo. 332; *Danville R. Co. v. Commonwealth*, 73 Penn. St. 38. In *Illinois Central R. R. Co. v. Grabill*, above cited, it was said: "There is no complaint in the declaration of annoyance by the running of engines, the escape of steam, or otherwise, near her (plaintiff's) premises. Such consequences of the construction and use of railroads must be borne by all living near them, and without hope of redress, for they are inseparable from the purposes and objects of such structures." And see *Moses v. Pittsburgh, Ft. Wayne & Chicago R. R. Co.*, 21 Ill. 516. There is no complaint here, that the railroad is not properly constructed, or that it was not operated in a skillful and careful manner.

It belongs to the idea of a nuisance, that it is abatable. In the original actions assize of nuisance and *quod permittat prosternere*, the former being brought against the one who levied the nuisance, and the latter against the alienee of him who levied the nuisance,

the judgment thereon, besides damages for the temporary loss sustained, was for an abatement of the nuisance. These actions finally went into disuse, and the action on the case became the remedy, and a party injured by a private nuisance might bring his action *toties quoties*, until the obstinacy of the party maintaining such nuisance should be overcome by repeated recoveries against him and the nuisance be abated. 3 Bl. Com. 222. But a railroad built by authority of law, or the operation of it, is not to be, and should not be, abated. It is built for the accommodation of the public. This is the object which justifies the exercise of the power of eminent domain, and the public welfare demands that there should not be discontinuance of the operation of an authorized railroad. Thus there is not, in such case, the same reason as exists in cases of ordinary private nuisance, for allowance of bringing actions as injury is done, which, as Blackstone says, will have the same effect as assize of nuisance, or *quod permittat*, "unless a man has a very obstinate as well as ill-natured neighbor, who had rather continue to pay damages than remove the nuisance."

For the class of injuries here sued for, injuries necessarily resulting from the operation of a railroad — there was no remedy, as we understand, previous to the Constitution of 1870. The Constitution of 1848 provided only that private property should not be taken for public use without just compensation. The provision for the first time was incorporated in the Constitution of 1870, that "private property shall not be taken or damaged for public use, without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law." Before the adoption of the latter Constitution, where there was land taken for public use, there was provision for compensation. But where there was other disconnected land not touched by the improvement, but damaged merely, as complained of in this case, no compensation was provided. To meet this want, the clause of the Constitution, restrictive of the exercise of the power of eminent domain, provides that private property shall not be taken or damaged for public use without just compensation.

We think it to be within the true intent and meaning of this provision as to damage, that there should be but one proceeding for recovery of damage, in which there should be recovery for the entire damage, past, present and future; that it should be similarly regarded, in this respect, as the provision in regard to

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the taking of property, where there is but one proceeding, and an assessment of compensation and damages once for all. The two provisions are coupled together, and are both in restriction of the exercise of the power of eminent domain. In respect to the awarding of compensation for the taking of private property for public use, Mills, in his work on Eminent Domain, section 216, says: "The appraisalment embraces all past, present and future damages which the improvement may thereafter reasonably produce." Had the railroad track in this case been laid over a portion of one of these lots, then in the condemnation proceeding for the taking of such portion, compensation would have been assessed for the value of the portion thus taken, and for the damage to the residue of the lot not taken. Such assessment would have embraced all future damage. As well here, in this case of no taking of land, might all the damages, past and future, from the operation of the railroad, be assessed, as they might be to the remainder in such supposed case of the taking of a part of a piece of land. If there might be successive recoveries, from time to time, of the constantly recurring damages, then as was said in the *Grabill* case, "a similar recovery might be had at every term of the court, and in this shape the plaintiff might recover tenfold the value of the property." We do not think that this constitutional provision intended any such result, that the just compensation giving for the damaging of land might be greater than that for the taking of the land.

The just compensation to be made for damage to land was, in our opinion, intended as an indemnity, not for successive, constantly accruing damages recoverable, as they may afterward be suffered, but for all the damage the land owner may suffer from all the future consequences of the careful and prudent operation of a railroad; it being the immediate damage done to the land owner's estate by changing its permanent condition and impairing its present value. See *Heard v. Middlesex Canal Co.*, 5 Metc. 81. The action for damage may be regarded as in the nature of one kind of condemnation proceeding.

Upon this point of estimation of damages, it was said in the *Maher* case, that the structure being permanent in its character, "it could be determined, with a reasonable degree of certainty, how much it depreciated the value of the land, as a permanent structure, how much less it was worth after the erection of the structure than before." This measure of damages is recognized in

the cases above cited from Bush, and in *C. & I. R. Co. v. Baker*, 63 Ill. 316, and *C. & P. R. Co. v. Stein*, 75 Ill. 41, and also in *Powers v. City of Council Bluffs*, *supra*, a case of damage to premises resulting from the improper construction of a ditch, where the court say: "The plaintiff's damage was susceptible of immediate estimation. No lapse of time was necessary to develop it. It was the difference between the value of his lots as they would have been if the ditch had been properly constructed, and the value of them as they were, with the ditch as it was" (page 657), and on page 656 it was said: "If the cause of the injury is permanent, the damages can be foreseen and estimated." With so much of certainty can the benefits or damages to real property which will result from the construction of a railroad be foreseen, that the mere location of the line of railroad has an immediate effect upon the value of all real property in the vicinity, in enhancing or depreciating it.

As all damages then, which will be sustained as the necessary result of the operation of the road, can be immediately estimated at the time of the construction and putting in operation of a railroad, from the effect on the value of the land to be damaged, it would seem to answer all just purposes of the land-owner, to allow but one action in which there might be recovery for all damages. The allowance of successive actions for damage, as it should occur from day to day, as new damage, would seem to serve but the purpose of harassing, and the wasting of means in expenses of litigation. The law does not favor the multiplying of actions.

A further view is, that the plaintiff purchased the property as it was, with its surroundings. The railroad was there, and in operation, and plaintiff bought the property with the disadvantage of the railroad. The railroad must be presumed to have decreased the market value of the property from what it would have been without the road, and it is to be taken that plaintiff paid but this decreased value for the property, so that in effect he has been allowed for all these damages resulting necessarily from the operation of the railroad, in the reduced price, which on that account he paid for the property, and for him now to recover for such damages in this action would be getting for himself a double allowance for the same thing, these damages. See *Toledo, Wabash & Western R. Co. v. Morgan*, 72 Ill. 155; *Kutz v. McCune*, 22 Wis. 628; *Mills Em. Dom.*, § 66; *Menmert v. McKeen*, 112 Penn. St. 315.

The conclusion is, that as the former owner could have sued and

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recovered for the depreciation in the value of the property caused by the railroad, the right of action was in him for a recovery of all damages that were or might be caused in the operation of the railroad, and that there is no right of recovery in his alienee, the appellee.

It follows that there was error in refusing the above proposition of law, and the judgment will be reversed and the cause remanded.

Judgment reversed.

DICKEY, J. I cannot concur in the views here expressed. I do not think our laws give to railroad companies a right by prescription, in five years, without payment of compensation.

SCHOLFIELD, J. As I understand this record, I concur in the judgment rendered, and I also concur, in the main, in the reasoning of the opinion by Mr. Justice SHELDON. To avoid misapprehension however I prefer to state, in my own way, briefly, the grounds on which my conclusion is based.

A railroad in the streets of a city, when not authorized by law, is a nuisance *per se*, and hence there may, in such cases, be recoveries by those whose property is injured thereby, from time to time, until it shall be abated. But before the adoption of our present Constitution it was held, that where there was legislative authority, a city council might authorize the location, construction and operation of railroads in the streets of cities, and that there could be no recovery by adjacent property holders for injuries sustained in consequence of their location, or of their construction, or of their operation, in the usual and ordinary manner of constructing or operating railroads, that all damages thus arising were *damnum absque injuria*. *Moses v. Pittsburgh, Fort Wayne & Chicago R. Co.*, 21 Ill. 522 *et seq.*

The only clause in our present Constitution affecting the question is that which provides that "private property shall not be damaged for public use without just compensation." This court held, in *Stetson v. Chicago & Evanston R. Co.*, 75 Ill. 74 (and the ruling has since been followed in kindred cases), that it is not indispensable to the right to construct and operate a railroad in the streets of a city, that the damages occasioned thereby to adjacent property holders shall have been previously ascertained and paid, in other words, that a railroad may be lawfully constructed and

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operated in the streets of a city, notwithstanding it shall cause injuries to adjacent property holders, the damages resulting from which shall not have been previously ascertained and paid.

It is sufficiently accurate to say, that this railroad is permanent.

The company is authorized, by its charter and by an ordinance of the city council, to locate and construct its road in the street.

The right to locate and construct a railroad implies the right to operate it in the usual and ordinary manner, and while the Constitution requires that damages arising from injuries thereby occasioned shall be compensated, yet according to the doctrine of the *Stetson* case such injuries are not in the nature of a nuisance, for which the railroad can be abated, but are rather in the nature of a condition subsequent. It must result, from the railroad being lawfully constructed in the street, and from the company having the implied right to use and operate it as railroads are ordinarily used and operated, that the railroad company has the further necessarily incidental right to injure adjacent property in the manner and to the extent that such ordinary use and operation will necessarily injure it, subject to the right of the owner to have compensation made therefor. And the railroad being permanent, the injury must be equally permanent, affecting the property from the time the road is constructed, and a right of action therefor then accrues, on the authority of the cases referred to in the opinion of Mr. Justice SHELDON, to recover, once for all, the damages resulting from the injuries sustained to the property. And it is, manifestly, upon this assumption that the general assembly have provided, in the Eminent Domain Act, for the compensation, once for all, of such damages. The authority to lay tracks in the streets measures the extent of the contemplated probable use; and on the question of damages to adjacent property, it is therefore to be assumed that the tracks authorized to be laid may be used to the full measure of their capacity; and so at once and ever after, the character and degree of damages sustained by the adjacent property holder is patent to all.

I concede, that if after the road is constructed, authority be given by the city council, and new tracks shall be laid which were not within the authority conferred by the council when the road was constructed, or that if the tracks laid when the road was constructed shall be subjected to a new and more burdensome use which was not within the authority conferred by the city council

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when the road was constructed, and adjacent property holders shall be injured by such new tracks or such new and more burdensome use, they may recover for the damages resulting therefrom; and I also concede that the adjacent property holders may recover, from time to time, for damages resulting from willful or negligent acts as to which the company would not have been protected by its charter, and the license and authority of the city council, to lay its tracks in the streets, before the adoption of the present Constitution. But the vibration caused to appellee's property, the casting of smoke, soot, etc., upon it here complained of, I understand, result from the ordinary, prudent use and operation of the railroad, as such roads are, in general, used and operated. The injury for which damages are claimed is that necessarily to be anticipated as resulting from the mere fact of the prudent construction and operation of a railroad in the streets of a populous city.

NOTE BY THE REPORTER.— See *Hargreaves v. Kimberly*, 28 W. Va. 787; s. c., 53 Am. Rep. 121; *Nat. Copper Co. v. Minnesota Mining Co.*, 57 Mich. 88; s. c., 58 Am. Rep. 833.

In *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145, where a company built a permanent dam across a river and caused water to flow back on plaintiff's land, and after the dam was completed sold it to the defendant, which simply maintained it, *held*, that defendant was not liable for the injury. The court said: "In no possible view could the appellant be held liable for the damage sustained before its purchase, nor on the other hand, could it be held liable for damage sustained after its purchase, except upon the theory that the nuisance was one which could and should be abated, and that the appellant was in fault in not abating it. But the special finding of the jury precluded this theory. Where an injury is permanent, it is such as is spoken of in the books as original, that is, as accruing wholly when the wrongful acts were done; and is distinguished from an injury which is to be regarded as continuing, that is, an injury that could and should be terminated, and is to be compensated strictly with reference to the past, and upon the theory that it would be terminated. *Town of Troy v. Cheshire R. Co.*, 3 Fost. 88; *Powers v. City of Council Bluffs*, 45 Iowa, 852; s. c., 24 Am. Rep. 792; *Van Orsdol v. Railroad Co.*, 56 Iowa, 470; *Gould Waters*, § 416. Where the injury is permanent, but one action can be maintained and the recovery allowed is for all damages, past and prospective. The right of an action in such case accrues wholly against the party doing the injury."

The subject of future damages is discussed by Mr. Guy C. H. Corliss, in 36 Albany Law Journal, 84, 104. We make some extracts:

"The cases all seem to agree that if the act which ultimately causes the future damages is a wrong in and of itself, and if actionable immediately and irrespective of the damages which flow from it, then a recovery of even the slightest damages will constitute an absolute bar to any further recovery, even

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though the future damages have occurred since the judgment in the first suit and could not have been foreseen. On this point we find practically no conflict. *Nat. Copper Co. v. Minnesota Mining Co.*, 57 Mich. 88; s. c., 58 Am. Rep. 383; *Williams v. Pomeroy Coal Co.*, 87 Ohio St. 588; *Kansas Pacific Railway v. Muhlman*, 17 Kans. 224; *Cumberland v. Hutchins*, 65 Me. 140, and cases cited; *Clegg v. Dearden*, 12 Q. B. 576; *City of North Vernon v. Voegler*, 103 Ind. 814; s. c., 58 Am. Rep. 184; *Foule v. New Haven, etc.*, 112 Mass. 834; s. c., 17 Am. Rep. 106; *Executors of Lord v. Carbon Iron Mfg Co.*, 6 Atlantic Rep. 812. This is too elementary to justify the collating of any more cases on the point. The foregoing are cited because they are all important authorities on this general subject. These cases all rest upon solid rock. They are founded upon the manifest but often ignored distinction between damages and injury. Both must concur to give a cause of action. It is true that in some cases the mere absence of proof of damages will not affect the action, an injury for which the law affords redress having been established, but in such cases the law presumes that at least nominal damages have been inflicted. Therefore the cases which are apparently, are not really exceptions to this rule. In no case has this distinction and its importance in the determination of the question we are considering been so clearly, so succinctly and yet so exhaustively discussed as in *City of North Vernon v. Voegler*, *supra*. ELLIOTT, J. (and his name is a guaranty that the views expressed are sound), says: 'There is a material distinction between damages and injury. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word 'injury' denotes the illegal act, the term 'damages' means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are in strictness words of widely different meaning. There is more than a mere verbal difference in their meaning for they describe essentially different things. The law has always recognized a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*. In every valid cause of action two elements must be present, the injury and the damages. The one is the legal wrong which is to be redressed; the other the scale or measure of the recovery. As there may be damages without an injury, so there may be an injury without damages. It has been many times said that no action will lie because the injury produced no damages, or as the law phrase runs, the wrong is *injuria sine damno*. The distinction between injury and damages is an important one in this instance, and for this reason we have been careful to mark the difference and enforce our statement by reference to authorities, although the principle is a rudimentary one. The distinction is important for the reason that the law is that fresh damages without a fresh injury will not authorize a second or subsequent action.'

"Probably the most valuable decision on this subject is *Nat. Copper Co. v. Minnesota Mining Co.*, *supra*. The eminent jurist who wrote the opinion in this case discusses the question with that grasp of first principles which is the distinguished 'ear mark' of all of his decisions. To same effect are *Clegg v. Dearden*, 12 Q. B. 576; *Williams v. Pomeroy Coal Co.*, 87 Ohio St. 588; and *Kansas Pacific Railway Co. v. Muhlman*, 17 Kans. 224. In the first

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case Lord DENMAN said: 'The gist of the action as stated in the declaration, is the keeping open and unfilled up of an aperture and excavation made by the defendant into the plaintiff's mines. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier, and the cause of action therefore is the not filling up of the excavation made by him on the plaintiff's side of the boundary and within their mine. It is not as in the case of *Holmes v. Wilson*, 10 Ad. & El. 508, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff. Nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 Mees. & W. 455. There is a legal obligation to discontinue a trespass or remove a nuisance, but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass, to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land was liable in an action of trespass, but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation.'

"The case of *Kansas Pacific Railway v. Millman*, is very similar to these two cases already referred to. The question did not arise under a plea of the statute of limitations, but that does not affect the case as an authority on this point. It will be an artificial and unnecessary distinction to make to discuss these cases in two separate classes, based upon the mere fact, that in one class future damages were claimed to be outlawed, and in the other that a recovery had already been had for the wrong from which such future damages subsequently flowed. When the future damages are so connected with the original wrong, that no cause of action can be predicated upon them alone, then the cause of action is gone, and such damages cannot be recovered, whether the cause of action is outlawed or there has been a recovery of some damages because of such wrong. In the case last cited, the defendant had constructed a ditch on the property of the plaintiff, and damages because of the trespass had been recovered. Subsequently another action was brought to recover the damages resulting from such ditch, accruing after the first suit, and which could not have been foreseen. The court held that the first recovery constituted a complete bar to the action, saying: 'On the other hand, as we have already stated, where the original act is unlawful and an invasion of the plaintiff's rights, the cause of action dates from the act, and a new cause does not arise from new damages resulting therefrom. * * * Counsel here would make the gist of the action the continuance of the ditch, as there the continuance of the excavation; but the fact is, the wrong was done when the ditch was dug, and an omission to re-enter and fill up the ditch was a breach of no legal duty. There are cases in which the original is considered as a continuing act, and daily gives rise to a new cause of action. Where one creates a nuisance and permits it to remain, so long as it remains it is treated as a continuing wrong and giving rise over and over again to causes of action. But the principle upon which one is charged as a continuing wrong-doer is that he has a legal right, and is under a legal duty, to terminate the cause of the injury. As to any thing upon his own land, a party has a right to control and remove

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it, and if it is so much of an injury to his neighbor's rights as to amount to a nuisance, he is under a legal obligation to do so, but as to that upon his neighbor's land he has no such right and is under no such duty.' It is apparent from this and other portions of the opinion that the court would have reached the same result, if the trespass had been the erection of a structure on the premises of the plaintiff. This is opposed to the cases of *Holmes v. Wilson*, 10 A. & E. 503; *Cumberland v. Hutchins*, 65 Me. 140, and similar cases.

"The court, in *Kansas Pacific Railway v. Muhlman*, say further on this point: 'It is true the books speak of such a thing as a continuing trespass. In 1 Addison Torts, 382, it is said that if a man throws a heap of stones or builds a wall or plants posts or rails on his neighbor's land, and then leaves them, an action will lie against him for trespass, and the right to sue will continue from day to day, until the incumbrance is removed. And in the case of *Holmes v. Wilson*, 37 Eng. C. L. 273, or 10 A. & E. 503, it appeared that the trustees of a turnpike, to support it, built buttresses on the plaintiff's land. He brought an action and recovered for the trespass. He then notified them to remove the buttresses. Failing to do so he sued again, and it was held that the action would lie. It seems to us very doubtful whether this ruling can be sustained upon principle. * * * If the company had entered to fill up the ditches could not Muhlman have maintained his action for that as a trespass? It seems so to us unquestionably. And it seems that the rule would be the same in case of such trespass as suggested in Addison, as the building of a wall or the heaping up of a pile of stones. Hence we doubt the doctrine as stated by him and as decided in *Holmes v. Wilson*.'

"If the trespass is a continuing one then a recovery must be limited to the damages which have already been sustained, and the first action is no bar to the second, nor that to a third and so on, so long as the trespass continues. Each day's continuance of the trespass gives a new and independent action. Therefore the expiration of a period of time since the inception of the trespass, sufficient to bar a recovery for that trespass, will not bar the right to recovery of future damages resulting from the continuance of such trespass, provided the damages flow from a trespass that has not become outlawed. The cases that sustain this doctrine are *Holmes v. Wilson*, 10 Ad. & El. 503; *Cumberland, etc., v. Hutchings*, 65 Me. 140; *Adams v. Railroad Co.*, 18 Minn. 260; *Troy v. Railroad Co.*, 28 N. H. 88; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; a. c., 53 Am. Rep. 128; *Anderson R. Co. v. Kernodle*, 54 Ind. 814; *Esty v. Baker*, 48 Me. 495; *Russell v. Brown*, 63 Me. 203; *Bowyer v. Cook*, 4 M. S. & L. 236; *Ford v. C. & N. W. R. Co.*, 14 Miss. 609; *Carlo v. S. & F. L. R. Co.*, 40 Wis. 625; *Blesch v. C. & N. W. R. Co.*, 43 Wis. 183; *Thompson v. Morris Canal & Banking Co.*, 17 N. J. L. 490.

"In *Holmes v. Wilson*, it appeared that a turnpike company had built buttresses on plaintiff's land for the support of its road. Plaintiff recovered damages for the trespass. A second action having been brought, a recovery in the first was relied on as a defense. The court held that it established no defense to the action which was to recover damages for a subsequent trespass, each day's continuance of the structure unlawfully on plaintiff's land constituting a distinct and independent trespass, for which a new action would lie. So in

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Cumberland, etc., v. Hutchins, the proof showed that the defendant had wrongfully filled up a canal. It was held that he was under a legal obligation to remove the obstruction, and that every day he suffered it to remain he was guilty of a new trespass, and therefore a recovery was not a bar to an action for future damages. This distinction is recognized in *Nat. Copper Co. v. Minnesota Mining Co.*, and *Kansas Pacific Railway v. Muhlman*. But in this last case the court intimated that it did not consider the mere omission to remove a structure placed on the land of another as a continuing trespass, for the reason that the trespasser had no right to enter and remove his erection. The court said with reference to *Holmes v. Wilson*, 10 A. & E. 508, that the plaintiff should have recovered in the first action as damages the expense of removing the structure, and that that should bar his right to maintain a further action, because of its maintenance. In the first case, *Nat. Copper Co. v. Minnesota Mining Co.*, the chief justice says on this point, after referring to the authorities: 'The principle of decision in all these cases is clear and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day. The plaintiff's possession was continually invaded and his rights to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day therefore the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not be legally assumed.' The eminent jurist's reason for this doctrine is not a very satisfactory one. The writer would suggest that no single suit could be made to embrace prospective damages, because the damages which would be sustained by the continuance of the trespass the next day, are to be assessed in a new action, which the new wrong gives to the plaintiff, and it would be grossly unjust, even as against the wrong-doer, to compel him to pay the same damages twice. The writer also desires to enter now and here his protest against the reasoning and doctrine of many of the cases based upon the permanency of the thing which causes the future damage.

"In *Cumberland, etc., v. Hutchins*, the court recognized and followed the distinction repeated in *Kansas Pacific Railway Co. v. Muhlman*, between the mere excavation of a ditch, on the premises of another and the placing of something thereon. The injury complained of was the filling up of a canal. The court said: 'The doctrine of all the cases is that a recovery of damages for the erection of a building or other structure on another's land does not operate as a purchase of the right to have it remain there, and that successive actions may be brought for its continuance until the wrong-doer is compelled to remove it.' The decision in *City of North Vernon v. Voegler, supra*, the judgment of the writer is indefensible on principle. The ground on which the ruling was based was that the grading of the streets being permanent in its nature, all damages sustained thereby, whether past or prospective, must be recovered in one action, and therefore a recovery in one action barred all further suits for damages, for the reason that there being only one cause of action the damages could not be divided, and assessed in different actions."

"The whole trend of this opinion is to the effect, that simply because the thing which had caused and may cause damages is permanent in its nature,

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the party who has once been injured must recover in one action all his damage; not only that which has and may flow from the particular occurrence, but also all damage which may result from another occurrence growing out of the thing which is permanent. It is well settled that such permanency does not make it necessary for, or even to give the right to the plaintiff, to assess future damages in one action where the continuance is a daily trespass or a nuisance. Why then should it, when the thing is not actionable in itself irrespective of damages? Certainly the first recovery is no bar to a second action for future damages if the plaintiff is not bound to have all his damages assessed in the first action. Now so far from being bound so to do, we submit that on principle he has not even the right to have this done, and that it would be error to allow such damages to be taken into consideration. Let us analyze the question, and determine the true doctrine on principle. If a thing is done which is lawful in itself, and not actionable until damages have resulted, it is clear that the cause of action is not the doing of the thing which causes the damage, but the doing of that thing conjoined with the damage. If then the cause of action is not the doing of that thing which occasions loss, but is made up of that element and the further element of damages, and never comes into existence until the damage results and owes its existence to such damage, how can the cause of action be more extensive or comprehensive than such damage? How can it embrace other damage than that which is connected with the particular occurrence which causes the damage? The thing was lawful, and not actionable until the party had suffered loss on account of it. To the extent of such loss, and to that extent only, is it actionable; beyond such damage the thing is as lawful as it was before the damage resulted. When a subsequent loss occurs it again becomes unlawful and actionable to that extent. There is manifest difference between such a case and the case of a trespass which is actionable immediately irrespective of damage, and for which at least nominal damage may always be recovered without the delay of a single day. Where the thing done is not actionable in itself, then no damages can be recovered, not even nominal, until damages have actually been occasioned thereby. In such a case the cause of action is the damage flowing from the act lawful in itself, and not the doing of such act, while in the other case the cause of action is the wrongful act itself independent of damages. As damages, and not the act, give the right of action, how can such action include any further damages than those which have created the cause of action? If it be said in reply, as in a certain sense it may be said, that the cause of action is the union of the two elements, injury and damage, actually sustained, then it is answerable that the recovery cannot be more extensive than either; it cannot include damages as to which there is no cause of action. Without the damage sustained the action has no support. Has it then any support beyond such damage? It must, if future damages either must be recovered in that action or the right to recover them forever barred. Suppose a person constructs on his own property a ditch, will any one pretend that that act is actionable? Suppose surface water by means of that ditch is afterward discharged upon premises of another, is the cause of action for digging the ditch or for throwing water by means of it on the plaintiff's property?

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Clearly the latter. After the discharge ceases, and the injury is complete, is it not plain that the maintenance of that ditch is lawful unless damages again result from it? And is it not equally plain that when damages do flow from it, a new cause of action accrues to the plaintiff? And that this new cause of action is not for the original digging of the ditch, but for again casting water by means of it on the premises of the plaintiff? Suppose A. should dig such a ditch, and before any damage had resulted from it, should sell his property to B., who should suffer such ditch to remain, there could be no possible doubt about B.'s liability for the damage done by water discharged through that ditch on the property of another. Why then is he liable? Simply because the law says that he shall not discharge surface water by means of a ditch upon the property of another, and not because the ditch was a nuisance which he has continued. This is the cause of action. Therefore every new discharge creates a new cause of action. Take the case of the removal by the owner of one of two adjacent tenements of the lateral support of the soil of his neighbor. No right of action then accrues. But if damage afterward ensues a cause of action arises. If subsequently new damage results, a new action is created. Why? Simply because the cause of action is not the removal of the lateral support, which is not wrongful in itself, for then only one action could be maintained, but causing the fall of the adjoining property because of the failure to give it the lateral support which the law requires. These suppositive cases might be added to, but it is unnecessary to do so, to illustrate and enforce the argument. Now it is submitted that where the thing done is not actionable until damage results, as was clearly the case in *City of North Vernon v. Voegler*, the fact that the defendant intends to maintain the thing permanently cannot render it obligatory on the party injured to anticipate and recover all future damages in his first action, when but for such intention no such consequence would result. Can a person or corporation, by announcing in advance that he or it intends to repeat the wrong, or suffer it to be repeated, compel another to submit to the repetition, and accept as his only redress the inadequate remedy of anticipating and recovering all future damages, even to the 'crack o' doom?' It is a strange doctrine that the manifestation of a purpose to persist in wrong-doing should deprive the party injured of causes of action that he would have, but for the manifestation of such purpose. We have taken the view of the question most favorable to the decision of the court in this case; and we submit that we have shown that even though the thing is clearly permanent, and is so understood by all parties, the party injured is not obliged to recover all future damages in his first action. But what was there in the case to justify the argument that the thing which had occasioned damage would be permanent? The fact that the grade of the street was permanently fixed would not be decisive, as the recurrence of the flooding might be prevented without altering the grade, and moreover what right had the court to assume that the grade would remain unchanged after the negligence of the city had been established? The more rational assumption would be that the city would rectify its mistake, and not continue in a course destructive to the rights of others. Self interest as well as justice would prompt it to pursue this line of policy.

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"Since writing this criticism on *City of North Vernon v. Voegler*, the case of *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; s. c., 53 Am. Rep. 123, has come to the notice of the writer. The assault in this case on the unsoundness of the reasoning and decision of the court in the former case is precisely the same as that made by the writer, who is not now so badly frightened at his temerity as before perusing the opinion in the case in the New York Court of Appeals.

"If as is manifest the recurrence of damages arising from an act not actionable in itself gives a new cause of action, and such new cause of action is effectually destroyed because the wrong-doer announces or it is clear that the cause of action will be permanent, why should not the permanency of the cause of damage defeat future actions where each day's continuance of the cause constitutes a new cause of action, as in the case of trespass? But it was held in *Holmes v. Wilson*, 10 Ad. & El. 503, that future action would lie in a case of a continuing trespass, although it was clear that the case would be as permanent as the cause in *City of North Vernon v. Voegler*, the continuing trespass being the erection and continuance of buttresses for a road on the plaintiff's property. Was not that as permanent in its nature as the grading of the street in the Indiana case? And yet Judge ELLIOTT says: 'Where the cause of action is the negligence and unskillfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action; and in a suit on that cause of action all damages present and prospective may be recovered, and for fresh damages resulting from the improvement a second action will not lie.' This is extremely illogical. The cause of action was not simply the naked negligence of the city in grading its streets, but the causing of damage by reason of that negligence. Every time negligence causes damages there is a new cause of action. The city might be ever so negligent in this or any other particular, but until damage had resulted therefrom no cause of action therefor could accrue against it. Is it not then absurd to assert that the mere negligence was the cause of action? Such a doctrine carried out to its inevitable consequence would bar the recovery of damages occurring after the lapse of a period sufficient to outlaw the original negligence, even though no complete cause of action had ever accrued during that time, for it rests upon the assumption that negligence was actionable *per se*. Under such a doctrine a cause of action might be outlawed before it ever came into existence.

"Permanent negligence renders it necessary to recover all damages in one suit. Therefore if a city announces that a ditch is to be left unguarded forever, the party who has been injured by it must recover his future damages, which may arise from further injury by it, in the same action. How could they be fixed, or even remotely estimated? There would be no basis on which damages could be calculated, and hence they could not be recovered. According to Judge ELLIOTT's doctrine, if the same person fell into the same ditch a second time, without a fault on his part, after he had recovered damages for the first injury, he would be absolutely without remedy. The monstrous absurdity and perversion of justice to which this doctrine, based on supposed or real permanency of the cause of damage, inevitably leads, are so palpable

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as to require no comment. The learned judge fancies he sees an analogy which sustains his views. He says: 'The case before us is closely analogous to the seizure of land under the right of eminent domain for railroad or highway purposes, and in all such cases it is held both by the English and the American courts that all damages, present and prospective, must be assessed in one proceeding.' Now there is not a particle of analogy between such cases and the case before him for decision. When property is taken under an exercise of the power of eminent domain there is no wrong. The act which invades plaintiff's right is lawful. It is known that that act is to be permanent, and that the invasion of plaintiff's property by that act, being lawful, the defendant can never be called to account therefor after having made just compensation. This act, though against the will of the owner, being lawful, he must then collect all damage which will flow from it or be forever barred. But when the act complained of is unlawful or becomes unlawful by damage flowing from it, a new cause of action is created every time damage is occasioned, because the defendant has not and never can have a right to damage the plaintiff by such act. When property is condemned for the benefit of the public, the law makes lawful the invasion of the owner's rights, which but for such public benefit would be unlawful. As the act is lawful, no action can be predicated on it, and the compensation which the law requires to be made must be made as the statute points out, and not by action. The two cases are as widely separated, so far as this question is concerned, as 'thrice from the center to the utmost pole.' Again Judge ELLIOTT wanders from the path of principle. He says: 'The complaint of the appellee, as we have seen, is based upon the negligence of the corporate officers in improving a street, and the improvement is a permanent one, so that the tort which formed the basis of the action was complete when damages resulted.' But the wrong consisted, not in negligently grading the street but in suffering such negligence to cause damage. The injury was done, not by the grading of the street, but by its condition after the grading was complete. Every time that condition causes damage a new actionable injury is occasioned, and a new cause of action arises. In fact there is no difference in principle between the continuance of a trespass and the continuance of negligence, except that the bare continuance of the former will *per se* give a new cause of action, while the persistence in the same negligence is not actionable unless it causes new damage. Right here a distinction should be pointed out which it is very important should not be lost sight of. It is not every kind of future damage in cases like these now under discussion which can be recovered in a new action. If the damages are connected with the first cause of action, they must be recovered in that action or never, even though they cannot be foreseen. Suppose in the case we are reviewing the first flooding of plaintiff's property had caused some bodily injury to the plaintiff, which subsequently, and after judgment in the first action, developed into a serious disorder, permanently impairing his health; and that the suit was brought to recover such future damage, there could be no question but that the first recovery would constitute a perfect defense, because these damages are inseparably connected with the occurrence which gave the plaintiff his cause of action. But if the premises are again flooded,

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is it not apparent that the action brought to recover the damages resulting from such subsequent flooding stands upon an entirely different basis? and that the plea of a former recovery has no application? This distinction is alluded to in *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125, where BRETT, M. R., said: 'Where an excavation has been made and subsidence has taken place, it may be true that for all the effects both existing and prospective, of that subsidence, the person injured ought to sue at once, and I incline to think that he ought. It is not necessary to determine that in this case, but I am strongly inclined to think that he ought. But what is to be done as to the new subsidence? * * * Therefore whilst I am strongly of opinion, although it is not necessary to decide it in this case, that in respect of the same subsidence the jury ought to take into account not only the actually existing damages, but also the prospective damages, which may be the result of that subsidence, yet I think that where there is a new and further subsidence that is a new cause of action.'

"The injustice of the doctrine enunciated in *City of North Vernon v. Voelger*, requiring future damages to be recovered where the cause of damages is permanent, is palpable, for such damages could not be recovered, as they are not susceptible to legal proof, for they must be at least reasonably certain or probable to warrant a recovery of them. Judge ELLIOTT, to support his views, cites *Town of Troy v. Cheshire R.*, 38 N. H. 88; s. c., 55 Am. Dec. 177; *Fowler v. New Haven, etc., Co.*, 112 Mass. 334; s. c., 17 Am. Rep. 166; *Powers v. Council Bluffs*, 45 Iowa, 652; s. c., 24 Am. Rep. 792; *Adams v. Hastings, etc., Co.*, 18 Minn. 265, and *Seely v. Alderny*, 61 Penn. St. 302, among other cases which require no consideration.

"The case of *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145, is to the same effect as the Indiana case, the court holding that damages sustained by the unlawful erection of a dam, permanent in its nature, must all be recovered in one action. In other words, the court decides that the wrong-doer, by making palpable his intention to persist in wrong-doing, thereby secures to himself the indefeasible right to continue his nuisance upon paying only such damages as have actually accrued, and can be shown to be reasonably certain to accrue in the future, although as a tort-feasor he can claim no indulgence from the law, and although it is extending an unprecedented indulgence to him to suffer him to continue a wrong on paying such damages as are necessarily inadequate in nearly every case, because no human prescience can foresee all the natural future consequences of an act with that clearness of vision absolutely essential to warrant the consideration by a court or jury of such consequences in fixing future damages under the law, which requires them to be reasonably certain.

"If these decisions are sound, then every private person may for his own private ends exercise the power of eminent domain by simply making his appropriation of his neighbor's property or his invasion of his neighbor's rights permanent in its nature, and then paying the insufficient damages, which are all that can be established under the law before the claim for damages has been outlawed. Where the act or thing which causes damage is a nuisance, the authorities speak but one language, and that is, that future damages can-

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not be recovered, but that every day's continuance of the nuisance is actionable. *Whitmore v. Bischoff*, 5 Hun, 176; *Thayer v. Brooks*, 17 Ohio St. 489; *Herrington v. St. P. & L. C. R. Co.*, 17 Minn. 215; *Dickinson v. C., R. I. & P. R. Co.*, 71 Mo. 553; *Mahon v. N. Y. C. & H. R. R. Co.*, 24 N. Y. 658; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; s. c., 53 Am. Rep. 124; *Fell v. Bennett*, Penn.; *Stadler v. Grieben*, Wis.; *Cain v. C., R. I. & P. R. Co.*, 54 Iowa, 255. But see *Chicago, etc., R. Co. v. Loeb*, 118 Ill. 203; *Baldwin v. Oskaloosa G. L. Co.*; s. c., 4 Am. Dec. 639; *Powers v. Council Bluffs*, 42 Iowa, 642; s. c., 24 Am. Rep. 792.

"In fact it may be stated as an undoubted rule that the continuance of any act or thing which is actionable only when coupled with damages is actionable every time damages flow from it. Where water is diverted, every day's persistence in such diversion gives a new action. *Langford v. Owsley*, 2 Bibb (Ky.), 215; s. c., 4 Am. Dec. 699. So where the diversion of a stream causes land to be flooded annually, every new submergence gives a new action. *Hootier v. Hannibal, etc.*, 70 Mo. 145. Damming or obstructing water so as to cause damages by flooding property or injuring mills, etc., is actionable every time damage occurs. *Plate v. N. Y. C. R. Co.*, 87 N. Y. 472; *Mersereau v. Pearrell*, 19 N. Y. 108; *Baldwin v. Calkins*, 10 Wend. 169. This is the rule where damages are claimed for obstructing light by a permanent structure. Every day's obstruction may be redressed by action. *Blunt v. McCormick*, 3 Denio, 283. To same effect are *Duryea v. Mayor, etc.*, 26 Hun, 120; *Winchester v. Stevens' Point*, 53 Wis. 350; *Union Trust Co. v. Cuffy*, 26 Kans. 754; *Spilman v. Roanoke Nav. Co.*, 74 N. C. 675.

The decision in the case of *Powers v. Council Bluffs*, *supra*, referred to in *City of North Vernon v. Voegler*, and cited therein to sustain the views of the court in that case, will constitute all the argument necessary to show the injustice and absurdity involved in such a doctrine. The action was for damages in negligently constructing a ditch, which caused an injury to plaintiff's land. The ditch was dug in 1860. Plaintiff was damaged in 1866, and subsequently from time to time. The court held that as the claim for the damage sustained in 1866 was outlawed, there could be no recovery, even for substantial damages sustained within the statutory time, for the reason that there was only one cause of action which comprehended all damages, those already suffered and those which might be sustained. Why? Because the ditch was permanent. The argument of the court is necessarily weak and inconclusive, as all argument in support of injustice must be. The court says: 'The case does not differ so far as principles in question are concerned from any case where an injury has been received by one person from the culpable negligence or unskilfulness of another.' But the reply to this argument is that the negligence causes daily damage. It is as though the carelessness of the defendant had its inception each day, for each day's continuance of it was as much a wrong as the original negligence. But this decision is too indefensible to need discussion to lay bare its unsoundness."

"The cases in which lateral or subjacent support has been removed have been referred to but not cited. They will now be considered. In *Backhouse v. Bonomi*, 9 H. L. Cas. 503, the action was brought to recover damages by

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reason of the subsidence of the superior tenant caused by an excavation of the underlying stratum; and the defense was that more than six years had elapsed since the completion of the excavation, but the House of Lords held that this fact constituted no defense as the subsidence had taken place within six years before the commencement of the action. It was held that the excavation, being lawful when made, never became unlawful for the purpose of giving a cause of action, but was the cause of the cause of action which was the subsidence itself. The cause of action therefore did not accrue till the subsidence took place, and the statutory time commenced running then and not before.

"In *Nicklin v. Williams*, 10 Ex. 259, the action was to recover damages sustained by a subsidence as in *Backhouse v. Bonomi*. The defense was that the cause of action for the subsidence had been satisfied, and to overthrow this defense plaintiff replied, that the action was brought for a subsequent subsidence. On demurrer this avoidance of the defense was held bad. The case is clearly in conflict with *Backhouse v. Bonomi*, and as the latter is a more recent and authoritative adjudication, the case of *Nicklin v. Williams* must be regarded as overruled. In *Lamb v. Walker*, 2 Q. B. Div. 389, the question was again presented under similar facts. The decision was the same as in *Nicklin v. Williams*, but the lord chief justice dissented, and his reasoning is unanswerable. Finally the Court of Appeals in *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125, reviewed the whole question and came to the only sound conclusion that each new subsidence created a new cause of action. It is true the question did not arise under the plea of a former recovery. The defense was the statute of limitations, but the court could not decide, as it did, that the claim for damages was not outlawed, without in effect holding that the new subsidence gave a new cause of action on which a recovery could be had even though a recovery had been had for the first subsidence. It is immaterial whether the cause of action for the first subsidence has been satisfied by a recovery or is barred by the statute of limitations. In either case no new action can be maintained for a new subsidence, unless such subsidence create a new and independent cause of action. The excavation which caused the subsidence in the case was made in 1868, and subsequently plaintiff was damaged by the subsidence of his land. In 1882 a new subsidence took place because of the excavation made in 1868, no new excavation having been made, and the one made in 1868 not having been disturbed since that time. It was claimed in the action brought to recover the damages sustained by the new subsidence, that when the first subsidence occurred the cause of action was complete, and that the second subsidence was but an element of the damages flowing from the digging of the excavation which was the cause of action and did not create a new cause of action. This sophistry was brushed aside by the court. BRETT, M. R., writing the opinion, based the decision of the court partly on authority but mainly on principle. He agrees with the argument of the counsel for the plaintiff, which he expresses in the following language: 'The reply on the part of the plaintiff is this, the fact of the defendant's excavating these minerals gave him no cause of action; it did him no injury by itself; they had a right to do it, their mines were their own property, and they had a perfect right to do what they liked with their own, so long as they did

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not hurt him. When they excavated the minerals which were their own property, if they had then and there taken means to prevent the sinking of the plaintiff's property, he would have had no cause of action against them. What they did in excavating was perfectly lawful, if they had taken care that in so using their property they did not hurt him. But in 1868, or immediately afterward, they did something which did give him a cause of action, that is, they caused his land to subside, and that subsidence caused by them was his cause of action. They caused that subsidence by mining, and not by propping, so as to prevent the plaintiff's land subsiding afterward. That cause of action was settled between them when they repaired his houses, but now they have done him a new and wholly independent injury; they have caused his land to subside again. It is true that in this case it is the same spot as before, but it might have been a hundred yards off. It is a new subsidence. They have caused that subsidence by the excavation of the minerals in 1868, and by not having filled up that excavation before 1882. It is no answer to the plaintiff in respect of this new subsidence which is the injury to him, to tell him that the *causa causans* of that was the same as the *causa causans* of the old subsidence. That *causa causans* gave the plaintiff no right of action at all in either case, but the two different results from it have given the plaintiff two causes of action, and although it is true to say, that for the same cause of action successive actions for damages cannot be maintained, yet there may be any number of successive causes of action. This is the whole dispute between the parties. Therefore we must consider what is the real cause of action.' Then after referring to the case of *Lamb v. Walker*, and particularly the opinion of the lord chief justice in that case, the court continues: 'I cannot help thinking that the judgment of the lord chief justice, which he might have founded entirely upon *Backhouse v. Bonomi*, examines the whole subject afresh, and gives the most weighty reasons to show that in such a case as this the only cause of action is the subsidence of the plaintiff's land, and if that subsidence has been brought about by the defendants, whether or not by the omission of something after commission, that is without taking precautions against the consequences of an act of commission by them, each subsidence is a new cause of action * *

* But what is to be done with a new subsidence? The mine owner has excavated on his own property; he knows that he caused a subsidence to his neighbor's property, and he knows that that neighbor is entitled to damages for it; will he run the risk of allowing the excavation to continue, the effects of which he may obviate by immediately putting up a wall or propping up his own property? If he does nothing he is not counteracting the effects on his neighbor's property, of something which he has done on his own; he is not counteracting that mischief to his neighbor by doing something on his own property; and if there is a new subsidence that will give his neighbor a new cause of action. The chief justice says it is difficult to conceive that the jury, which is the tribunal that is to give damages for the first subsidence that is existing, ought to give damages for a prospective new subsidence, which the defendant has the option and the right to prevent; so that although before the verdict of the jury is given, or although at the time that that verdict is given the mine owner is doing that which will prevent any future damage, neverthe-

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less the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. That seems to me to be a proposition, which when it is well sifted out and examined cannot stand, and therefore the chief justice's reasoning of itself and without reference to *Backhouse v. Bonomi*, is conclusive to show that each subsidence is a fresh cause of action * * * Therefore I agree with the lord chief justice's views, that each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same.'

"This case was carried to the House of Lords and the judgment of the Court of Appeals, Lord BLACKBURN dissenting, affirmed, 11 App. Cas. 127; 54 L. T. R. (N. S.), 882. The opinion of Lord FITZGERALD is the most convincing and satisfactory of the opinions delivered in the House. Indeed his reasoning and the reasoning of COCKBURN, C. J., dissenting in *Lamb v. Wreker*, can neither be answered nor criticised.

"In *Whitehouse v. Fellows*, 10 Q. B., N. S. 765, the defendants, as trustees of a turnpike company, had so constructed a drain along the highway as to cause injury by the flow of water to plaintiffs' mine. To the action brought to recover damages the defendants set up the statute of limitations; but the court held that the action was not barred, as the damages sued for had been sustained within the statutory period, although the construction of the drain was beyond that period. The Court of Appeals, in *Mitchell v. Durlay Main Colliery Co.*, thus very clearly states the substance of the reasoning of the court in *Whitehouse v. Fellows*: 'The Court of Common Pleas said the *causa causans* of the injury to the property was a continuing cause, but that cause alone gave to the mine owner no cause of action. It was a cause which if thereby any damage was occasioned to a mine owner's property would immediately give him a cause of action. It had given a cause of action some time ago, but since that the trustees continued it. They might have stopped it. The continuing *causa causans* remained, and remained in the power of the trustees, and that caused a new injury to the mine owner's property. That was a new cause of action, because it was an injury to the land owner's property in each case.'

"In *McGuire v. Grant*, 25 N. J. L. 356, the defendant had removed the lateral support of the plaintiff's land. Damages having been subsequently sustained, suit was brought. The statute of limitations was relied on as a defense, the removal of the lateral support having taken place beyond the statutory period. But the court held that the cause of action was the damage sustained by the falling of the land, and that the falling of the land, having occurred within the time limited the statute of limitations was no defense. The case of *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; s. c., 58 Am. Rep. 128, is an exceedingly important decision on the subject under consideration. It is true that the subject of future damages was not authoritatively settled in that case, as what was said on that point was mere *obiter*. But the opinion contains such a careful review of the whole matter that it will not be disregarded in the future by that tribunal."

In *Williams v. Pomeroy Coal Co.*, 27 Ohio St. 583, the facts were as follows: Defendants, while working their mine, broke over the line, and took coal from

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the mine of the adjacent owner. The trespass was committed in 1861. In 1868, the plaintiff while working his mine, the mine on which defendant had trespassed, broke into the excavation which defendants had made, and through the opening thus made water flowed into and damaged the plaintiff's mine. Action was brought to recover the damages suffered by plaintiff, and it was urged on his behalf that it was a proper case for the application of the doctrine of continuous nuisance, and that therefore every item of damage created a new cause of action. But the court held that the only wrong of which the defendants had been guilty was the original trespass committed when they broke through into plaintiff's mine in 1861, and that therefore the plaintiff's claim for damages was outlawed.

"A recent case in the New Jersey Court of Chancery is very interesting and important. It is *Executors of Lord v. Carbon Iron Manuf. Co.* The syllabus states with precision the substance of the decision. 'For a simple trespass, which is complete when the force by which it was committed ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy to the law is an action of trespass, in which the person injured must recover his damages once for all.'

"As a general rule the only legal duty which a trespasser incurs by his wrongful act, where his trespass is complete when judicial aid is invoked, is a liability to reimburse the person injured in money for the loss which his trespass has caused.

"If an upper mine owner breaks through a barrier which was left by the lower mine owner for the purpose of protecting his mine against the water which otherwise would flow from the upper into the lower mine, the trespasser is answerable for the damages, including the costs of restoring the barrier; but the trespass in such case imposes no legal duty upon the trespasser to either close the opening or to prevent the water in his mine from flowing through the opening into the lower mine.

"The flowage of water from the upper mine into the lower through an opening thus is neither the continuance of a trespass nor of a nuisance, and gives no distinct ground of action.'

"The suit was in equity to compel the defendants to protect the complainants against water flowing from defendant's mine into the mine owned by complainants through an opening. The court assumed, for the purpose of the argument, what however was not the fact, that the defendants had made the opening, and that it was a trespass for which they were responsible. It was urged that although the action for the original trespass was barred by lapse of time, yet that every day's continuance of the opening gave the complainant a new cause of action, for the reason that the defendants owed to the plaintiffs the duty of repairing the breach, and that therefore equity would interfere to compel the performance of this duty to prevent a multiplicity of suits. On this point the court say: 'Therefore if the wrong which forms the ground of his action had been committed on the surface, and had consisted of an excavation made in the complainants' land, and also of the removal of a solid stone wall erected by the complainants on their own land to prevent the water of a pond standing on the defendants' land from overflowing theirs, and the effect

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of the defendants' wrongful acts in making the excavation and removing the wall had been to produce a continuous discharge of the water of the pond over the complainant's land, which would continue, constantly inflicting additional injury so long as the wall was not restored, and the complainants had failed to apply for protection while the wrong was in progress, but came seeking it after all force and violence had ceased, and after the defendants' trespass as a legal wrong was fully completed, though its injurious consequences were still in progress, I consider it entirely clear on principle that under such a condition of facts this court would be powerless to give the complainants any relief whatever. It is certain that the trespass could not be restrained, for as already remarked, it is impossible to restrain or prevent the doing of that which has already been done. It is equally certain that this court has no power to decree the payment of pecuniary damages in satisfaction of such a wrong, and I know of no power in this court or in any other which gives it authority when one person had made an excavation in the land of another, to command the aggressor to go back and fill up the excavation, and restore the land to its original condition. Such a decree would, I think, be entirely anomalous, having the support of neither precedent nor principle. And it would produce this incongruous state of affairs: To redress the first trespass the court would command the aggressor to commit a second. Nor do I think this court has power in such a case to compel the wrong-doer to erect a wall on his own land to protect the injured party against the consequences of his wrongful act. The practical effect of such an exercise of power, it will be observed, would be to fasten a perpetual easement on the lands of the aggressor as a remedy for a trespass committed by him on the land of his neighbor. I have never understood that it was possible for any such consequences to flow from a trespass, nor that it was possible for an easement to have its origin in such a source. Acts which are wrongful in their origin may be repeated so frequently and so long as to raise the presumption of a grant, and thus to transform what was originally wrongful into a right; but I know of no act which a wrong-doer may do on the land of another which will give the person injured a right of any kind in the land of the wrong-doer.

"It would seem therefore to be entirely clear, that if the trespasses on which the complainants ground their right to relief had been committed on the surface, this court would have been without the slightest pretense of jurisdiction over the case, and that the only remedy to which the complainants could in that case have had recourse would have been an action at law. But the complainants say that their right in this respect is changed by the place where the trespasses were committed, and by the character and consequences of the trespasses. The proposition on which they rest their right to a remedy in equity is this: That the defendants, by their trespasses, having placed the two mines in such a position or relation to each other that water rising in the defendants' mine must necessarily, by force of the law of gravitation, flow into that of the complainants, they thereby imposed upon themselves, as a consequence of their wrong, a legal duty to prevent the water accumulating in their mine from flowing into the complainants' mine; and that inasmuch as the complainants can only have adequate protection against the injuries which will arise

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from the violation of duty, by an injunction commanding the defendants to prevent the water in the mine from flowing into the complainants' mine, their right to relief in equity is clear, for the reason that a court of equity is the only tribunal which can effectually and adequately redress their wrong. This proposition, it will be observed, goes to the length of declaring that it is a settled rule of law, that a trespass which is complete in every thing except its damnifying consequences when suit is brought, will in a case like the present raise a duty against the person committing it to do something more in making redress for it than to pay pecuniary damages. No such duty, it is clear, exists by force of any general principle, and if it exists at all, it must be as an exception to some general rule. According to the rule which prevails generally, if not universally, in such cases, the only legal duty which a trespasser incurs by his wrongful act, where his act, as a legal wrong, is complete when judicial aid is invoked, is a liability to reimburse the injured person, in money, for all loss, both direct and consequential, which his trespass has caused. If A. breaks the window of B.'s house, and a rain storm should afterward occur before B. could, by the exercise of reasonable diligence, have the windows repaired, and his house should in consequence be seriously injured by the rain, B. in a suit against A. would be entitled to recover all the damages which his house has sustained, as well resulting from the destruction of the windows as those subsequently caused by the rain. But B. could not leave his windows in the insecure condition in which A.'s wrongful act put them, and then maintain an action against A. for not repairing them. To allow B. to maintain an action against A. for not repairing the windows would involve this absurdity: A. would have no right to enter B.'s close to repair the windows — if he went there, even for that purpose, he would commit a further trespass — and so, if B. should be allowed to maintain an action against A. for not repairing the windows, his action would rest on A.'s not doing that which he had no right to do.'

"It has been held however that where the plaintiff sues merely at law to recover his damages, but brings a suit in equity to have the thing which causes him continuous damages enjoined and for damages, it is proper for the court to assess the permanent damages to his property sustained by the thing, on the theory that it is to remain forever, and direct that the defendant pay such damages upon receiving from the plaintiff a deed of the property actually seized, and consequential damages to the other property of the plaintiff. *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423.

"The court said: 'In view of the annoyance and expense incident to the stoppage of the defendant's trains, it was just to open the doors of escape and permit the defendant at once to acquire title to the land, and thus avoid the delay incident to other proceedings for that purpose; but it was notwithstanding optional with the defendant to comply with the condition. The plaintiffs could not require it, but they would be bound by the judgment, and the defendant becomes on performing the condition purchaser of the land, with rights not inferior to those obtained by appraisement and payment of damages under the statute. * * * It is however objected that the plaintiff should have in this action no damage save for the actual trespass to the time of bring-

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ing the action, and should by successive actions have accruing damages for the maintenance of the railroad subsequent to the commencement of the action, or only nominal damages for the original trespass, until by the action of ejectment he has possession, and that for damages in the depreciation in value above referred to, he should wait until the defendant institutes proceedings to acquire title under the statute relating to that matter. If that is so, a court of equity is powerless, the multiplicity of actions not prevented, and a new and altogether useless litigation encouraged for no good purpose. I think the objections not tenable, and discover no reason for denying any relief to which the plaintiff would in any action or before any tribunal be entitled. The defendant has, for the purposes of its incorporation, entered upon an exclusive and permanent occupation of the land, embedded therein its tracks, and is enjoying it as fully as if the right to do so had been legally secured. In that event compensation must have been made to the owner, and the two things concurring, the title of the defendant would be complete and the owner legally satisfied. The same result should be reached in this proceeding. The parties are before the court; they have had their day. Those matters have been passed upon which might have gone before commissioners under the statute, and for every trespass the plaintiff may recover in this action.'

"This case is not in conflict with *Utine v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; s. c., 58 Am. Rep. 123, as the plaintiff is not bound to proceed in equity and it is only when he invokes the aid of an equitable tribunal that the court will compel him to accept his permanent damages and grant and release his rights to the defendants. It is entirely proper for a court of equity to grant this relief, for the defendant could obtain the same result by proceeding under the statute to condemn the plaintiff's property. The measure of damages in such a proceeding and the rights secured by the defendant would be precisely the same. However it may be safely asserted that the plaintiff, suing in equity, would not be compelled to accept such damages and convey and release his rights where the defendant would not have the right to seize the property of the plaintiff under the right of eminent domain. This would be arrogating to itself a power not possessed by the Court of Chancery — the power to convert by decree, and against the consent of the owner, a mere trespass into a transfer of his property on receiving compensation. The doctrine that all damages connected with and flowing from a single cause of action must be recovered in one action, is so elementary, has obtained so long, and is founded upon such obvious principles of justice and reason, that no extended examination of the authorities will be attempted. The following cases, among others, which might be or have already been cited, sustain this doctrine: *Donaldson v. M., etc., R. Co.*, 18 Iowa, 280; *Penn. R. Co. v. Brooks*, 57 Penn. St. 389; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 42; s. c., 10 Am. Rep. 327; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Klein v. Jewett*, 26 N. J. Eq. 474; *M., etc., R. Co. v. Whitfield*, 44 Miss. 466; *Whitney v. Clarendon*, 18 Vt. 252.

"And yet in the face of this well-settled doctrine, we find the English Court of Appeal, or rather the judges of that court, totally disregarding it, in the case of *Brunsdon v. Humphrey*, 14 Q. B. Div. 141. Plaintiff's person and cab were injured by the negligence of defendant's servants. Having recovered

 Illinois, Decatur and Springfield Railroad Company v. Ervin.

damages in one action for the injury to his cab, he brought a new action for the damages to his person. *Held*, he could recover, the ground of decision being, that as plaintiff was injured in two distinct rights — person and property—he could maintain two distinct actions. Lord COLERIDGE dissented, saying: ‘That the injury done to the plaintiff is injury done to him at one and the same moment, by one and the same act, in respect of different rights, *i. e.*, his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it.’ In the court below the two members of the court agreed with the views expressed by the Lord Chief Justice.— See opinions of POLLOCK, B., and LOPES, J., in 11 Q. B. Div. 712.”

 ILLINOIS, DECATUR AND SPRINGFIELD RAILROAD COMPANY V.
 ERVIN.

(118 Ill. 260.)

Railroads — unjust discrimination — contract for rebate.

A contract between a railroad company and a shipper, that the latter shall pay the regular and established rates of freight, the same as all other shippers, and that the company shall pay back to him a certain portion of the freight so charged and paid, whereby such shipper will pay a less rate for transportation than that paid by others, and the public generally, for like services, under similar circumstances and for like distances, is void as against public policy at common law, and under the statute against unjust discriminations.

ACTION to recover rebates for freight charges. The opinion states the case. The plaintiff had judgment below.

James A. Eads, for plaintiff in error.

C. C. Clark and Nelson & Harnsberger, for defendant in error.

SHELDON, J. This action was brought by Rice Ervin and John Ervin, against the Indianapolis, Decatur and Springfield Railway Company, to recover for certain rebates claimed to be due them on certain contracts for the shipment of grain over the defendant's railroad, from Tuscola, Illinois, during the years 1879, 1880 and

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1881. The general issue, and a special plea setting out these contracts were filed by the railway company. A demurrer was sustained to the special plea. On the trial of the case in the court below, the defendant offered to prove, under the general issue, that at and before the time of making the contracts sued on, defendant had established a schedule of reasonable rates and tolls for the transportation of grain and other property over its railroad, in accordance with the schedule of rates that had been prepared for it by the railroad and warehouse commissioners of the State of Illinois; that plaintiffs resided at Tuscola, Illinois, and were engaged in buying grain and shipping it over defendant's railroad, and that plaintiffs and the general freight agent of the defendant entered into a secret agreement that the grain and other property of plaintiffs to be shipped over the railroad should be billed out and charged at the regular schedule rates, and that the same should be paid by plaintiffs the same as was charged to and paid by the public generally for similar services, under similar circumstances and for like distances, and that the company should pay back to plaintiffs, by way of rebate, a portion of the freight so charged and paid, from two to eight cents per hundred pounds on all grain shipped by them over the road, giving to plaintiffs a less rate for transportation than was given to the public generally for like services, under similar circumstances, and for like distances; that the rates so given to plaintiffs were private and not open to the public generally, and less than were charged to the public generally, less than the schedule rates, and than any other shipper had, except Davis & Finney; that plaintiffs and Davis & Finney did the bulk of the grain business on the railroad; that no other grain shippers had such special rates, and could not compete with plaintiffs. This evidence was all excluded by the court, and exception taken. The special plea sets out substantially the same facts, with the addition that the president of the company had instructed the freight agent not to allow plaintiffs less than the regular rates, of which plaintiffs had notice, and that they had notice of the regular schedule rates. Judgment went for the plaintiffs for \$6,711.73, after the overruling of a motion for a new trial, and was affirmed by the Appellate Court for the third district. Defendant sued out this writ of error.

It is insisted the contracts, as set out in the special plea, and offered to be proved at the trial, are void, as in violation of the statute of the State against extortion and any unjust discrimination.

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by railroad companies in freight and passenger rates, and as against public policy. This question, as respects the statute above named, then in force, was presented before this court in *Toledo, Wabash & Western R. Co. v. Elliott*, 76 Ill. 67, where a contract for such a rebate was held not to be in violation of the statute to prevent unjust discrimination in charges by railroad carriers. This ruling was followed and affirmed in *Erie & Pacific Despatch v. Cecil*, 112 Ill. 185.

It is contended by appellee's counsel that these cases should control the present decision. The statute under which the *Elliott* decision was made, was different from the present statute which applies here. The contract in the *Elliott* case was made in February, 1872, and the statute which applied there was the act which went in force July 1, 1871, entitled "An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this State for the transportation of freight on said roads." Laws 1871, 1872, p. 635. That act provided only against unjust discrimination between places and not between individual shippers, so that it was well said in the *Elliott* case: "We do not understand the contract is at all in violation of the statute to prevent unjust discrimination in charges by railroad carriers." But a subsequent statute, approved May 2, 1873, which went in force July 1, 1873 (R. S. 1874, p. 816), and is the one applying to this case, provides against unjust discrimination between individual shippers, as well as between places. The second section of the act provides, in general terms: "If any railroad corporation in this State shall make any unjust discrimination in its rates or charges of toll for the transportation of passengers or freight upon its road, it shall be deemed guilty of having violated the provisions of the act, and be subject to its penalties." Section 3, after speaking as to discrimination between places, provides further: "Or if it (railroad corporation) shall charge, collect or receive from any person or persons, for the transportation of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for the transportation of the like quantity of freight of the same class, being transported from the same point, in the same direction, over equal distances of the same railroad, or if it shall charge, collect or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons

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for receiving, handling or delivering freight of the same class and like quantity at the same point upon its railroad," or shall make the like discrimination between persons for the use and transportation of any railroad car, "all such discriminating rates, charges, collections or receipts, whether made directly, or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken, against such railroad corporation, as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates." The fourth section provides, that any such railroad corporation guilty of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights, shall upon conviction thereof be fined in any sum not less than \$1,000, or more than \$5,000, for the first offense, and in increased sums for subsequent offenses.

The aim of this statute is against favoritism, against charging one shipper more than another for the like service, under like conditions. The statute regards this as an unjust discrimination and denounces and punishes it as such. Unjust discrimination by common carriers was not sanctioned by the common law. In the case of *Chicago & Alton R. Co. v. People*, 67 Ill. 16; s. c., 16 Am. Rep. 559, this court say: "The duties and liabilities of a common carrier are clearly defined by the common law, and have been so defined for centuries. * * * Another well settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust or injurious discrimination between individuals in their rates of tolls." In *Messenger v. Penn. R. Co.*, 36 N. J. Law, 407, it was decided that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry, under the same conditions, for others, was void, as creating an illegal preference. The plaintiffs in that case had made shipments at the regular rates, under an agreement that they should be allowed such drawbacks as would bring their freights twenty and ten cents per hundred lower than the lowest rate given to any other person. The suit was to recover such drawbacks. The contract was held, upon the principles of the common law, to be illegal, and on that ground a demurrer to the declaration was sustained. Whenever the contract which the party seeks to enforce,

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be it express or implied, is expressly or by implication forbidden by the common or statute law, no court, either of law or equity, will lend its assistance to give it effect. 2 Chit. Cont. 971. This is the well-settled rule of law.

The evidence offered and excluded tended, in our opinion, to make a case of unjust discrimination, under this statute of 1873, to prove a contract to give the plaintiffs an undue preference over others, in charging them lower rates on their shipments. Such a contract appears to us to be one in contravention of this statute. As the matter stands, plaintiffs have paid the regular rates, and have been treated alike with other shippers not having had any undue advantage. To enforce such a contract as above, and adjudge defendant to pay the rebate claimed, would be to compel defendant to make an unjust discrimination in favor of plaintiffs, and require the company to do what the statute forbids doing. Such a result the law will not aid in accomplishing. In the *Cecil* case, the contract was made in 1881, and was one for a rebate on a single shipment of corn. The principal questions there controverted and discussed were as to the making of the contract and the authority of the agent. There was no discussion of the validity of the contract. There was merely an extract from the opinion in the *Elliott* case, and then this observation: "What was there said is equally applicable here, and under the authority of that case we must hold the agreement in this, valid and binding." It was mistakenly remarked, that what was said in the *Elliott* case was equally applicable in the *Cecil* case. The contract in the former case was made when the statute of 1871 was in existence, and the decision there was with reference to that statute. The contract in the *Cecil* case was made while the statute of 1873 was in force. But the difference between the two statutes was not brought to the attention of the court, and it was supposed the same statute was involved in both cases, so that the *Cecil* case really affirmed nothing more in this regard than that the decision in the *Elliott* case, with reference to the statute of 1871, was correct. Neither of those cases therefore should control the present one.

We are of opinion the Circuit Court erred in sustaining the demurrer to the special plea, and in excluding the offered evidence.

The judgments of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court.

Judgment reversed.

BARTH V. LINES.

(118 Ill. 374.)

Marriage — dower — barred by ante-nuptial agreement.

An ante-nuptial agreement, by adults, fairly understood, that each party releases the right of dower in the lands and estate of the other, and permits the other to hold his or her separate property free of all claims growing out of the marriage, bars the wife's dower.

BILL for dower. The opinion states the case. The defendant had judgment below.

W. C. Kaeffner and James M. Dill, for appellant.

Turner & Holder, R. A. Halbert and A. S. Willerman, for appellees.

MAGRUDER, J. In June, 1875, John Barth, a resident of St. Clair county, a widower, forty-seven years old, with nine children, the owner of about one thousand acres of land, worth from \$80,000 to \$100,000, and of personal property worth from \$1,500 to \$2,000, married a widow named Maria K. Lines, now Maria K. Barth, the appellant in this cause. The marriage took place in St. Louis, Missouri, on the 29th of June, A. D. 1875. Previous to the marriage an ante-nuptial contract was made between Barth and Mrs. Lines, which was signed by them on June 18, 1875, the day of its date, and acknowledged on June 21, 1875, before a justice of the peace in St. Clair county. It was recorded in that county on June 8, 1876, and is as follows:

“This agreement, made this 18th day of June, A. D. 1875, between Mary K. Lines, of Mascoutah, in the county of St. Clair and State of Illinois, of the first part, and John Barth, the second, of the county and State aforesaid, of the second part, witnesseth, that whereas a marriage is about to be had and solemnized between said parties, and whereas said Mary K. Lines is possessed of real and personal estate, to-wit, certain houses and lots in the platted town of Mascoutah, a stock of store goods, negotiable securities, etc., and the said John Barth, the second, is also possessed of real and personal estate, to-wit, farming and timber lands, in the county and State aforesaid, farm stock and negotiable securities; and

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whereas, it is mutually desired by the said parties that the estate of each shall remain separate and be subject only to the sole control of its respective owner, as well after as previous to the solemnization of the marriage, they hereby mutually agree and covenant, first, that the estate of the said Mary K. Lines shall remain her separate property, subject entirely to her individual control and management, as if she were unmarried, the said John Barth, the second, not acquiring, by force of said marriage, for himself, his heirs, assigns or creditors, any interest therein, or in the use or control thereof, or in the income, rents, profits or dividends arising thereout.

“And whereas, it is also agreed, that all estate, real or personal, which said Mary K. Lines may hereafter acquire or become entitled to in any manner, shall be held by her to her separate use as aforesaid, and be thereby placed beyond the control and management of John Barth, the second:

“Now therefore it is agreed by said John Barth, the second, in consideration of the marriage, and of a further consideration hereinafter mentioned, that he will waive, release and relinquish unto the said Mary K. Lines all the dower interest in the real estate which she now possesses or hereafter may acquire, or in any manner become entitled to, of which he may become vested by force of the contemplated marriage, and at all times during the coverture of said Mary K. Lines, permit her to control and manage said estate, and such estate as may hereafter come to her, as hereinbefore is named, and to receive, expend or re-invest the income, rents and profits and dividends thereof, at her own separate discretion, free from his interference or control, to her own separate use; and the said John Barth, the second, hereby covenants and agrees to and with said Mary K. Lines, her heirs and assigns, that he will warrant and defend said estate and property, and all such estate and property as she may hereafter become in any manner entitled to, to the said Mary K. Lines, against himself and his heirs, to her separate use; that he will permit her to dispose of the same by will, as she may bequeath the same, and that he will not in any manner interfere with her absolute control thereof; that the estate of the said John Barth, the second, shall remain his separate property, subject entirely to his individual control and management, as if he were unmarried, the said Mary K. Lines not acquiring, by force of said marriage, for herself, her heirs, assigns or creditors, any inter-

est therein, or in the use or control thereof, or in the income, rents, profits or dividends arising thereout.

"And whereas, it is also agreed, that all estate, real or personal, which said John Barth, the second, may hereafter acquire or become entitled to in any manner, shall be held by him to his own separate use as aforesaid, and be thereby placed beyond the control or management of said Mary K. Lines:

"Now therefore it is agreed by said Mary K. Lines, in consideration of said marriage and of the foregoing covenants on the part of said Barth, the second, that she hereby expressly waives, releases and relinquishes unto said John Barth, the second, all dower interest in the real estate which he now possesses or hereafter may acquire, or in any manner become entitled to, of which she may become vested by the contemplated marriage and will at all times, during the coverture of said John Barth, the second, permit him to control and manage said estate, and such estate as may hereafter come to him, as hereinbefore is named, and to receive, expend or re-invest the income, rents, profits and dividends thereof, at his own separate discretion, free from her interference or control, at his own separate use. And the said Mary K. Lines hereby covenants and agrees to and with said John Barth, the second, his heirs and assigns, that she will warrant and defend said estate and property, and all such estate and property as he may hereafter become in any manner entitled to, to said John Barth, the second, against herself and her heirs, to his separate use; that she will permit him to dispose of the same by will, as he may bequeath the same, and that she will not in any manner interfere with his absolute control thereof.

"Witness our hands and seals the day and year above written.

JOHN BARTH, the second. [Seal.]

M. K. LINES. [Seal.]

On July 7, 1884, John Barth died intestate, leaving the appellant, his widow, and eleven children, nine of them, the children of a former wife, as above stated, and two of them, the fruit of his marriage with appellant, all of whom are the appellees in this cause.

The appellant filed her bill on September 5, 1884, in the Circuit Court of St. Clair county, for assignment of dower and homestead, and the contract, above recited, is set up by appellees, as a bar to her claim for dower. The Circuit Court found it to be a bar and so decreed. This is an appeal from that decree, and the question,

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which it brings before us is, whether the agreement in question is a bar to appellant's right of dower in her deceased husband's lands.

The case of *McGee v. McGee*, 91 Ill. 548, seems to be decisive of the question. We there held that an agreement, substantially the same as that in the case at bar, was in equity a bar to the dower of the demandant, although it was wanting in the requisites of a legal or statutory jointure. In that case the agreement recited, that each party owned real and personal property, and provided that each should retain the control and possession of his or her own property free from all claim on the part of the other, and each thereby renounced all claims of dower or otherwise in the lands or personalty of the other.

It is said however that the contract passed upon in *McGee v. McGee* was made in 1857, and that "as the law then was, the husband on the consummation of the marriage succeeded to the absolute ownership of the personal property of the wife, and was entitled to curtesy in her real estate, as well as the usufruct thereof," whereas under the law, as it stood in June, 1875, the husband had no estate as tenant by the curtesy in his wife's land, and a married woman was as much entitled to the separate ownership and control of her personal property as though she was a *feme sole*. It is therefore argued, that by the agreement now under consideration, Barth surrendered nothing to the appellant as a consideration for the release of her dower interest in his lands, which the law did not already secure to her, independently of any contract.

It is to be noted however, that when appellant made the agreement in question, she was a woman of mature years, and a merchant, engaged in business for herself. She owned real estate, worth from \$1,500 to \$2,000, consisting of two lots, in Mascoutah, upon one of which was a house, in which she kept a store. She also owned a stock of "store goods," worth some \$4,000 or \$5,000. If she should die before her husband, he would have dower in her real estate, and become the absolute owner of one-third of her personalty. By the agreement, he released all claim to the interests, which the law would thus have given him in her estate, and empowered her to dispose of it by will, free of any dower rights therein on his part. She made the same relinquishment to him of whatever interest the law would give her in any of his property. He was a farmer, and she kept a store. Each was to control and manage his or her own property, free from any interference by the

other. The marriage seems to have been a sort of business arrangement.

The statutes of most of the States now make the wife as free and independent in the control of her property as the husband is in the control of his property. As a result of this legislation, the tendency of the modern decisions is to uphold ante-nuptial contracts, made fairly and without fraud by adult, single women. A woman "may bar her dower in any lawful manner, since by the statutes she can make any lawful contract." *Wentworth v. Wentworth*, 69 Me. 244. "There is perhaps no principle better settled than that any provision, which an adult, before marriage, agrees to accept in lieu of dower, will amount to a good equitable jointure." *Andrews v. Andrews*, 8 Conn. 79. "Where the parties agree beforehand, that after marriage each shall hold his or her ante-nuptial property to his or her separate use, and on the death of one of them, neither shall have any marital claim on the estate of the other, this is, at least in a court of equity, generally esteemed to be a good bar to dower." Bish. Marr., § 423.

The provision of our statute, that when a conveyance is made to, or in trust for an intended wife, for the purpose of creating a jointure in her favor with her assent, to be taken in lieu of dower, such jointure shall bar any claim for dower by her in the lands of her husband (Hurd Rev. Stat. of 1885, chap. 41, § 7), "cannot be said to deprive her of the power to bar her right to dower by any other form of ante-nuptial contract. * * * This however is not the case of a settlement or jointure, but of a contract." *Nail v. Maurer*, 25 Md. 532.

Scribner, in his work on Dower (vol. 2, pp. 409 and 413, says: "With respect to the legal requisite, that the estate, limited in jointure, be such an estate of freehold as should continue during the wife's life, no such circumstance will be necessary in equity, in order to make the jointure an absolute bar to dower, if the intended wife be of age and a party to the deed, because as she is able to settle and dispose of all her rights, she is competent to extinguish her title to dower upon any terms, to which she may think proper to agree. * * * The cases are not entirely agreed upon the question, as to whether an ante-nuptial contract, which merely secures to the wife her separate property and makes no provision for her out of the husband's estate, is a good equitable jointure, but in a majority of the cases, it is held, that if it be a part of such

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agreement that the wife shall relinquish her dower, it will be good in equity."

For the reasons here stated, we think that the agreement, made by appellant with her deceased husband, operates as a bar to her claim of dower in his lands. The proof shows, that she entered into it with a full understanding of its meaning and effect. It rests upon the consideration of her husband's release of all his legal rights in her separate estate. The decree of the Circuit Court is therefore affirmed.

Decree affirmed.

SHOLL V. GERMAN COAL COMPANY.

(118 Ill. 437.)

Eminent domain — public use.

A strip of land cannot be condemned by a coal company for the construction of a tramway leading from the coal works to a public railroad.

CONDEMNATION proceedings. The opinion states the case. The petitioner had judgment below.

B. S. Prettyman, for appellant.

Muckle & Whiting, McCulloch & McCulloch and Puterbaugh & Puterbaugh, for appellee.

MULKEY, J. The German Coal Company, a domestic corporation organized under the general Incorporation Act, for the purpose of "mining and selling coal," filed a petition under the Eminent Domain Act, in the County Court of Peoria county for the purpose of acquiring, by condemnation, the right of way over a narrow strip of land belonging to the appellant, Adam Sholl, and lying between the company's coal works and the Peoria and Pekin Union railroad. The piece of land sought to be condemned was wanted for an extension of a tramway belonging to the company, so as to connect it with the railway, and thus secure to the company railroad facilities for the transportation of its coal. The right to condemn the property for such purpose was resisted by the defendant from the outset, as violative of the Constitution of the State. The objection however was overruled, and after a very vigorous and somewhat protracted contest, the court entered an order of condemnation,

upon the payment of \$500 to defendant, the amount of compensation and damages awarded by the jury. From that order the defendant appealed to this court, and has assigned upon the record various errors as grounds for reversal.

Many of the general principles constituting the law of eminent domain are well settled. The right to take private property for public use is generally conceded to be an attribute of sovereignty, and being such, it is not within the power of the State, by legislative grant or otherwise, to surrender or barter it away. Being inherent, it exists independently of written constitutions or statutory laws; yet in free governments like ours, where private rights are secured by wholesome laws and constitutional restrictions, the power to take private property for the common welfare remains dormant until the terms and conditions upon which it is to be exercised have been prescribed by appropriate legislation. The power or right in question is by some referred to the feudal theory of tenure, by others to the implied compact theory, but the better opinion perhaps is that it is founded upon public utility and necessity. The exercise of the power is a strictly legislative function, and subject to the right of the courts to determine whether the use for which property proposed to be taken is a public one, and whether the condemnation proceedings have been conducted according to law, the legislature is made the exclusive judge of the necessity or emergency justifying the exercise of the power. So far there is little or no contrariety of opinion. The chief difficulty, and the one which has led to an irreconcilable conflict in the cases, is to discover some satisfactory test by which a public use may, in all kinds of cases, be distinguished from a private one. Such is the difficulty here. The parties in this case are agreed, that if the use for which the property sought to be taken is a private one, there is no power or authority, under the Constitution, to take it, and that consequently the order of the court below was without authority of law, and void. On the other hand, if the use under the facts disclosed is a public one, it is clear the court below had power and jurisdiction to make the order, however many errors may have intervened in the proceeding.

The question then, whether the use in the present case is a private or public one, is not only directly presented, but it is of controlling importance in the event it should be determined against the petitioner, for whatever our views might be on the other ques-

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tions discussed by counsel, the judgment below would have to be reversed. As before stated, the decided cases furnish no universal test by which it may be described or defined, and the attempts to do so have resulted in more or less conflict.

Without attempting to define a public use, or to give such a test, a few general observations on the subject may not be inappropriate. The expression "public use," *ex vi termini*, implies an interest or right of some kind in the public, and as the public can have no existence separate and apart from the people, of which it consists, it follows that this interest or right, whatever it is, belongs to and is vested in the people. This being so, it is the duty of the State to see that it is properly protected. Without attempting, as we might if the question were an original one, to determine the nature and extent of this interest or right, we have no hesitancy in saying, that if the use is a continuing one, as it is in all cases where property is taken for the purposes of a public ferry, railway or the like, the right or interest of the public is co-extensive with the use to which it is annexed, and that it is not within the power of those exercising the franchise to deprive the people of the benefits resulting therefrom. Persons, or corporations condemning property for such purposes, assume certain obligations and duties to the public, which they cannot disregard without forfeiting their franchises, and otherwise rendering themselves liable. In all such cases, the character of the business proposed to be done, and the manner of doing it, must be looked to in determining whether the use will be a public or private one. If from the nature of the business and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true that benefits resulting from a public use, capable of individual appropriation, are open to all alike, upon the same terms and conditions.

Viewing the question before us in the light of the general principles here stated, it is clear, the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works and the present tramway are, in the strictest sense, private property, and the public, generally, have no more interest in them or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be

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equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character, or the obligations of the company to the public in the slightest degree. Without the consent of the owners of it, there is not a person in the State, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight. Indeed nothing of the kind is contemplated or intended. It is manifest, the company now has, and after such extension of its track would still have, the right to use it for its own private business, exclusively. It could run it or cease to use it altogether, without violating any right in the public, or any duty which it owes to the people. Clearly, this could not be so if the use were public, in the sense of the Constitution.

This question however is not a new one in this court. It incidentally arose in *Millett v. People*, 117 Ill. 294; s. c., 57 Am. Rep. 869. The plaintiff in error in that case had been indicted, as the operator of a coal mine, for a failure to provide scales, and to weigh all coal taken out of the mine, as a basis for computing the wages of the miners, as required by an act of the legislature, approved June 14, 1883. It was urged, by way of defense, that the act was unconstitutional, in this, that it singled out owners of coal mines as a distinct class, and imposed upon them burdens not imposed on other owners of property and employers of laborers. To this it was replied, that the business of mining coal, like that of railways, public warehouses, etc., was of a public character, and that therefore the legislature had the right, for the protection of the public, to adopt such special regulations as were deemed necessary for that purpose, and that the act in question was nothing more than a reasonable exercise of that right. The question therefore, it will be perceived, was directly presented, whether the use in the operation of a coal mine is a public one, and it was held that it was not. To the same effect is *Edgewood R. Co.'s Appeal*, 79 Penn. St. 257.

Upon the authority of these cases, and for the reasons stated, we are clearly of opinion that the use for which it is proposed to take appellant's property is a private and not a public one. Having reached this conclusion, it is not necessary to consider other questions discussed in the briefs.

The judgment below is reversed, and the cause remanded, with directions to dismiss the petition.

Judgment reversed.

Matter of Bates.

MATTER OF BATES.

(118 III. 534.)

Assignment for creditors — creditors secured by mortgage.

Where a mortgagor assigns all his property for the benefit of his creditors, the mortgagee may share equally with unsecured creditors. (*See note, p. 389.*)

CLAIM against insolvent assignor's estate. The opinion states the case.

Eckels & Kyle and *H. T. Gilbert*, for appellant.

Skinner & Bros. and *Kendall & Lovejoy*, for appellee.

MAGRUDER, J. On July 2, 1883, Sower Bros. made a trust deed to George S. Skinner, upon their mill property in Princeton, Bureau county, to secure their notes to the appellee, Annie G. Paddock; on April 26, 1884, they made an assignment for the benefit of their creditors, to appellant, Eugene C. Bates, and in the list of creditors attached thereto, named appellee as having a claim for \$1,000; on May 15, 1884, the assignee gave notice to all creditors to present their claims within three months; on August 14, 1884, appellee presented to the assignee and proved her claim for \$1,017, being the amount due upon the notes, so held by her; on August 18, 1884, the assignee reported and filed with the clerk of the county court, a list of the creditors, who had proved their claims, including therein appellee's claim, and stating therein, that said claim was secured by the trust deed, above named; no person, interested as creditor or otherwise, filed any exceptions to her claim within thirty days, or at any time; on December 30, 1884, the assignee filed in the office of the county clerk his report, showing that the total amount of all claims filed, including that of appellee, was \$14,423.58, and that the total amount in his hands, subject to distribution, was \$5,162.65, that appellee's claim then amounted to \$1,043.33, and that the property described in the trust deed securing it was worth only \$765.75, and therein praying for an order of distribution of thirty per cent among the creditors, except appellee, and as to her claim for an order to pay her thirty per cent on the excess of her claim over and above \$765.75, and to hold in his hands thirty per cent on said \$765.75 until her rights

in the mortgaged property should be determined and realized upon, or until the further order of the court; the assignee's report, dated December 30, 1884, was approved by the County judge on January 27, 1885, and a dividend ordered in accordance with the prayer thereof; appellee took an appeal to the Circuit Court of Bureau county, and upon a hearing of the cause on September 29, 1885, the Circuit Court rendered a decree approving said report of the assignee, affirming the order of the County Court made thereon, and directing a distribution to be made in the same manner as directed by the County Court; at the hearing, appellee offered to surrender or assign her claim and trust deed to the assignee or other creditors, on payment of her claim in full, or to release her claim and trust deed upon payment of her claim in full by the assignee or creditors, but such offer was refused; at the hearing also appellee entered her motion for a dividend of thirty per cent upon the full amount of her claim, as proven and reported, which motion was overruled by the Circuit Court; appellee prosecuted her appeal from the Circuit to the Appellate Court; the Appellate Court reversed the decree of the Circuit Court, remanded the cause with directions, that an order of distribution be entered, giving the appellee here, who was the appellant there, a dividend upon the full amount of her claim, and adjudged that she should recover of the assignee, Bates, who was appellee there, and appellant here, her costs; the Appellate Court has allowed the assignee an appeal to this court upon a certificate, that the case involves questions of law of such importance, on account of the principal and collateral interests, as that it should be passed upon by the Supreme Court.

The question presented for our consideration is whether the assignee should have paid appellee a dividend upon the whole amount of her claim, as proved and reported, or a dividend only upon the excess of her claim over and above the value of the security, which she held. We think that the Appellate Court decided correctly, and that the dividend should have been upon the whole amount of the claim.

The interest of the assignors in the property covered by the trust deed passed to the assignee, subject to the lien of the trust deed. All that the assignee took by the deed of assignment was the equity of redemption. The trust deed was owned by the *cestui que trust* therein named, and could not be subjected to the control or disposition of the assignee.

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The thirteenth section of the "Act concerning voluntary assignments," etc. (Starr & Curtis' Stat., p. 1307,) provides that "every provision in any assignment hereafter made in this State providing for the payment of one debt and liability in preference to another, shall be void." The payment here referred to is a payment to be made out of the assets passed by the assignment to the assignee, or obtained by him by virtue of his position as assignee. If the letter of the law forbids any provision to be made in the instrument of assignment for preferential payments out of the assigned assets, the spirit of the law would forbid any such preferential payments in the mode of distributing such assets. To pay all the creditors, except one, dividends upon the full amount of their respective claims, and at the same time to pay that one creditor a dividend upon a portion only of his claim, is to give a preference over one creditor to all the rest of the creditors.

The thirteenth section, above named, also provides, that "all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." Appellee's debt, as proved and reported, without objection or exception, was \$1,043.33. Her debt was not \$277.58, the excess of \$1,043.33 over \$765.75, the estimated value of her security. Her whole debt was provided for in the assignment, because the whole of it was mentioned by the assignor himself, as one of his debts, in the attached list of liabilities. It was therefore the whole debt and not a part of it, which was to be "paid *pro rata* from the assets." It is true, that appellee held a trust deed, securing her debt, but such trust deed had never been foreclosed, and no part of the debt had been paid out of the security. Before the assignment, appellee could have filed a bill to foreclose her trust deed, or if she preferred, she could have sued at law on the notes and enforced "payment from other means than the mortgaged property." *Rogers v. Meyers*, 68 Ill. 92. She could have obtained judgment and levied on personal property, though holding a mortgage on real estate. So after the assignment, she could claim her dividend on her whole debt out of the general assets of the estate, though possessed of a special security. Of course, she could have but one satisfaction. The amount of the dividend must be credited on the debt, and the mortgage foreclosed for the balance, and in the event of a surplus, that surplus would go to the assignee for the benefit of the other creditors.

Counsel for appellant claims, that the assignment act provides for winding up the trust within a limited time, and that such trust might be indefinitely prolonged, if its settlement should await the realization of a surplus, after foreclosure. By the decree of the Circuit Court, the assignee was to take from the assets thirty per cent of \$1,043.33, to-wit, \$312.99, and of this, pay thirty per cent on \$277.53, to-wit, \$83.27 to appellee, but the balance, to-wit, \$229.72, that is, thirty per cent of \$765.75, was to be held by him, until the trust deed should be realized upon by foreclosure. The disposition of the \$229.72, so left in the hands of the assignee, would be delayed fully as long as the ascertainment of the surplus could be postponed.

When property pledged is unequal in value to the debt, to hold that it is payment to the extent of its value, would occasion insuperable inconveniences. Who is empowered to fix the value? How can a mortgage estate be rendered absolute in the mortgagee, unless he chooses to foreclose, by suit, for condition broken? How can the mortgagee be compelled to make a conveyance of his estate to third persons, at an appraised value, unless his whole debt is paid?

We are aware that there is conflict in the authorities upon this subject. The doctrine, that a creditor, under a general assignment, who has a special security, can only claim a dividend upon the amount remaining unpaid, after exhausting the property, upon which he has such special lien, is supported by decisions in Iowa, New York and Rhode Island, among which are the following cases: *Wurtz v. Hart*, 13 Iowa, 515; *Besley v. Lawrence*, 11 Paige, 581; *Knowles, Petitioner*, 13 R. I. 90. These cases found their conclusions mainly upon the well-known equitable rule, that when one creditor has a lien upon two funds, and another a lien upon only one of them, the former will be compelled to resort, for satisfaction, in the first instance, to the fund upon which he has an exclusive lien. They seem however to overlook the important qualification, that the rule in question will not be enforced whenever it will trench upon the rights, or operate to the prejudice of the party entitled to the double fund. *Sweet v. Redhead*, 76 Ill. 374; *Brown v. Cozard*, 68 Ill. 178; *United States v. Duncan*, 12 Ill. 523. In its application, the paramount incumbrancer must not be "delayed or inconvenienced in the collection of his debt, for it would be unreasonable, that he should suffer because some one else had taken imperfect security." 3 Pom. Eq. Jur., § 1414.

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It is easy to see that if this rule is enforced in the case at bar, it will work to the prejudice of appellee. She cannot realize her whole debt by foreclosing the trust deed. It is admitted that the property, covered by the trust deed, is worth less than her whole debt by the sum of \$277.58. If she should first foreclose and realize \$765.75, the value placed upon her security, she would then receive, in addition thereto, under the ruling of the Circuit Court, only \$83.27, the thirty per cent of \$277.58, making her total receipts \$849.02, and leaving \$194.31 of her debt unpaid. But if she should be paid thirty per cent of her whole claim, to-wit, \$312.99, in the first place, and the \$765.75 should be realized by foreclosure hereafter, she will have been paid in full, and a small surplus left over for the creditors. If the \$229.72, held by the assignee, should eventually all be paid to her, the order of the Circuit Court delays and inconveniences her in the collection of her debt, as she is compelled to wait for her dividend, until a foreclosure shall be effected, while the other creditors receive their dividends at once.

The weight of authority is with the position here taken, that appellee is entitled to a dividend upon the full amount of her claim, before exhausting her security. Story (1 Equity Jurisprudence, § 564 b.), says: "The general rule in the settlement of insolvent estates is, to allow the creditor to prove his whole debt, without regard to any collateral security he may hold. If the dividend so reduces the debt, that the collateral security will more than pay it, the personal representative is bound to redeem for the benefit of the general creditors."

Jones on Pledges, section 587, says: "The pledgee may prove his whole claim against the pledgor's estate in insolvency without deducting the value of his security. This is the rule more generally adopted in the absence of a statutory requirement. If the dividend so reduces the debt, that the collateral security will more than pay it, the security must be redeemed for the benefit of the general creditors. This rule gives effect to the equitable principle, that a creditor's diligence shall be rewarded by giving him his full legal rights."

In *Morris v. Olwine*, 22 Penn. St. 441, which was a case of distribution under an assignment for the benefit of creditors, a creditor by bond and mortgage was held entitled to a *pro rata* dividend on his whole claim, even though he had collected the greater part of it out of the mortgaged property, the amount collected and the

dividend together not being sufficient to satisfy the debt. He was not restricted to a dividend on his claim, as reduced by the proceeds of the mortgage. To the same effect are *Miller's Appeal*, 35 Penn. St. 481, and *Grassf's Appeal*, 79 Penn. St. 146, both of which were cases of distribution under assignments for the benefit of creditors. The Pennsylvania decisions hold that a creditor is entitled to a dividend under an assignment, not merely as a creditor, but as an equitable owner of the assigned estate, and that the extent of his ownership is fixed by the amount of his claim, when the assignment is made.

The doctrine, here contended for, is further sustained by the following cases: *Jervis v. Smith*, Buff. Super. Ct. Rep. 189; *Mason v. Bogg*, 2 My. & Cr. 443, 446; *Putnam v. Russell*, 17 Vt. 54; *West v. Bank of Rutland*, 19 Vt. 403; *Walker v. Barker*, 26 Vt. 710; *Moses v. Ranlet*, 2 N. H. 488; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. Anderson*, 18 B. Monr. 114; *Schunk's Appeal*, 2 Barr. 304; *Duncan v. Fish*, 1 Aiken, 231; *Evertson v. Booth*, 19 Johns. 486; *Van Mater v. Ely*, 13 N. J. Eq. 271.

The rule, laid down in these cases, is in harmony with the spirit of our own decisions. In *Morrison v. Kurtz*, 15 Ill. 193, Morrison held notes, signed by the three partners in a firm, composed of Kurtz, Davis and Loyd, which notes were secured by a trust deed upon the separate estate of Loyd. After dissolution of the partnership by the death of Davis and Loyd, in an equity proceeding begun by Kurtz, as surviving partner, certain mill property, owned by the firm, was sold under the decree of the court, to raise money to pay the debts. Morrison was a general creditor of the firm, claiming his share of the proceeds of sale, and at the same time held special security against the land of one member of the firm. This court there said: "The only objection to Morrison's sharing in the distribution is, that the estate is insolvent, and that his debt is secured by a deed of trust of Loyd's private estate, to which he can resort for the payment of his debt, and to which the other creditors of the firm cannot resort for the payment of their debts. * * * We think that he has a right to insist upon his distributive share of the cash raised from the sale of the property, as a creditor of the firm. As a creditor of the firm he has the same abstract right to the proceeds of the sale as the other creditors. He is as meritorious in every respect as they, and because he was more vigilant and cautious in requiring security, it is no reason why he should be put in

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a worse condition than the other creditors, by having his debt postponed and his payment delayed, till by a proper proceeding he can realize out of the property upon which his debt is secured, while the other creditors are paid in cash." *Brown v. Cozard, supra; Sweet v. Redhead, supra.*

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Wurtz v. Hart*, 18 Iowa, 515, it was held that "a creditor under a general assignment, who has a special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid, after exhausting the property upon which he has such special lien."

So in *Besley v. Lawrence*, 11 Pal. 587, the chancellor said: "The rule that where a creditor has two funds of his debtor to which he can resort for payment, and another creditor has a specific or general lien upon one of those funds only for the payment of his debt, equity will compel the first creditor to resort to that fund to which the lien of the other does not extend, is unquestionably applicable to this case."

In *Petition of Knowles*, 18 R. I. 90, the court said: "In Pennsylvania a creditor who has received a part of his debt from the sale of property upon which he had a lien is entitled to a *pro rata* dividend on the whole amount of his claim out of the general assets of the debtor in the hands of an assignee to an amount sufficient to pay the residue of his debt in full. *Shunk & Freedley's Appeal*, 2 Penn. St. 309; *Morris v. Olwine*, 22 Penn. St. 441, 442; *Keim's Appeal*, 27 Penn. St. 42, 46; *Brough's Estate*, 71 Penn. St. 460, 462; *Graeff's Appeal*, 79 Penn. St. 146, 148, 149; *Miller's Estate*, 82 Penn. St. 113-116. In New York and Iowa, on the contrary, such a creditor is entitled to a dividend upon the residue only of his debt after exhausting the property subject to his lien. *Strong v. Skinner*, 4 Barb. 546, 560; *Besley v. Lawrence*, 11 Pal. 581; *Midgeley v. Slocumb*, 32 How. Pr. 423, 426; *Dickson v. Chorn*, 6 Iowa, 19; *Wurtz v. Hart*, 18 Iowa, 515, 519. We prefer the doctrine of the New York and Iowa cases. It accords with the well-established rule in equity, that when one creditor has a lien upon two funds, and another a lien upon only one of them, the former will be compelled to exhaust the fund upon which he has an exclusive lien, and will be permitted to resort to the other for the deficiency only."

In *Paddock v. Bates*, 19 Bradw. 470, the doctrine of the principal case is laid down. "The authorities are in conflict, and a plausible reason can be given for either view. We think the weight of authority is in favor of the proposition that the dividend should be allowed on the whole claim."

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(118 Ill. 534.)

Malpractice — physician — degree of skill required — evidence.

In an action against a surgeon for malpractice, evidence of his reputation, in the community and among his profession, as to skill, is inadmissible. (*See note, p. 392.*)

ACTION for malpractice. The opinion states the case. The plaintiff had judgment below.

Strawn & Patton, for defendant in error.

MULKAY, J. The present writ of error brings before us for review a judgment of the Appellate Court for the second district, affirming a judgment of the Circuit Court of Livingston county, in favor of Joseph Hoy, the defendant in error, and against Samuel E. Holtzman, the plaintiff in error, for the sum of \$2,500. The action, in form, was trespass on the case, and the cause of action was alleged negligence and unskillfulness on the part of the defendant, as a physician and surgeon, in the treatment of the plaintiff's leg for a serious and complicated fracture.

The case is submitted here on the briefs and arguments filed in the Appellate Court, and as it most usually happens when this course is pursued, they are, in the main, occupied with a discussion of controverted questions of fact, a matter with which we have no concern. The case, so far as it is open to review here, is brought within a very narrow compass, and may be disposed of in a few words.

On the trial below, the court refused to permit Dr. Gaylord, one of the defendant's witnesses, to answer the following question: "I will ask you what his (Dr. Holtzman's) reputation is in the community, and amongst the profession, as being an ordinarily skilful and learned physician," and the court's action in disallowing the question is assigned for error. Waiving the formal objections to this question, which are apparent, we have no doubt of the correctness of the ruling of the court upon it. The duty which the defendant, as a physician and surgeon, owed the plaintiff, was to bring to the case in hand that degree of knowledge,

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skill and care which a good physician and surgeon would bring to a similar case under like circumstances. While this rule on the one hand does not exact the highest degree of skill and proficiency attainable in the profession, it does not, on the other hand, contemplate merely average merit. In other words, in order to determine who will come up to the legal standard indicated, we are not permitted to aggregate into a common class the quacks, the young men who have had no practice, the old ones who have dropped out of the practice, the good and the very best, and then strike an average between them. This method would evidently place the standard too low. As a physician or surgeon cannot bring the requisite skill to any case unless he has it, it follows, the professional skill of the defendant was, if not in express terms, at least by implication, put in issue in this case, and the *onus probandi* was upon the plaintiff to show his want of such skill. The proper and only mode of doing this was by proving that he did not exercise it in the treatment of the plaintiff's leg.

It does not however follow because the defendant's skill, or rather the want of it, was put in issue, it could be either established or disproved by showing his general reputation. While his skill or the want of it was put in issue, his reputation in that respect was not put in issue, and therefore evidence to establish it was properly excluded. Suppose it appeared, from the evidence, the treatment of the plaintiff's leg was proper, and in every respect according to the most approved surgery, and evidence of the character offered had been admitted, would it have availed the plaintiff any thing if it further appeared, from the evidence, that the defendant was generally reputed to be an unskilful and unsafe surgeon? Surely not. The hypothesis here suggested, as we conceive, is but a presentation from a different stand-point of the principle contended for, but in a way that more forcibly illustrates its unsoundness.

There are many reasons, outside of those mentioned, why evidence of this character is not admissible. First, its bearing upon the issue is too remote, and in many, if not most of the cases, it would tend to mislead the jury rather than enlighten them. The veriest quack in the country, by his peculiar methods, not unfrequently becomes very famous, for the time being, in his locality, so much so that every person in the neighborhood might safely testify to his good reputation. It is true that one's reputation thus acquired

is generally of short duration. His patrons, sooner or later, must pay the penalty of their credulity, by becoming the victims of his ignorance, and with that his good name vanishes. Yet according to the principle contended for, the quack in such case, when called to account for his professional ignorance, might successfully intrench himself behind his previous good reputation. Again one may, in many respects be a good practitioner, and deservedly stand well in the neighborhood in which he lives, and yet at the same time be grossly ignorant about some matter in the line of his profession, which would render him liable, if by reason thereof his patient should be improperly treated, and thereby subjected to loss or injury. In such case it is manifest, evidence of the defendant's good reputation would be no answer to an action brought for the injury sustained, and its admission would be clearly calculated to mislead the jury.

Other illustrations might be given of the impropriety of admitting such testimony, but it is not necessary to do so.

The general view here presented we think sufficiently meets the main points made by counsel for plaintiff in error upon the defendant's refused instructions, and for this reason we do not deem it necessary to discuss them in detail. Suffice it to say, in general terms, that taking the instructions as a whole, we think the law, as applicable to the case made by the evidence, was fairly laid down to the jury, and that in this respect plaintiff in error has no ground to complain.

In this connection it may be added that the opinion in this case, delivered by Mr. Justice BAKER, in the Appellate Court, discusses the questions made upon the instructions in a very full and elaborate manner, and we are fully satisfied with the view taken of them in that opinion.

The judgment will be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.— See *Barnes v. Means*, 83 Ill. 379; s. c., 25 Am. Rep. 328; *Small v. Howard*, 128 Mass. 131; s. c., 35 Am. Rep. 863.

In *Ely v. William*, New Jersey Court of Error and Appeals, June, 1887, it was held as follows:

In an action by a physician to recover reasonable compensation for professional services, rendered defendant at his request, defendant offered evidence tending to show that plaintiff had mistaken the disease, and treated him for a complaint which he did not have. The court instructed the jury that such mistake would not prevent recovery, unless they further found that the plain-

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tiff did not exercise proper care and skill as a physician. *Held*, correct. The rule is general, that wherever labor and services are performed at the request of another, there is an implied promise raised by the law to pay for such work and services what they are worth; and the skill and care required in doing the work, in order to deserve compensation, is that ordinarily possessed and exercised by others in like callings. Chit. Cont. 796. The physician, like the attorney, undertakes in the practice of his profession that he is possessed of that degree of knowledge and skill which usually pertains to the other members of his profession. And the physician, in attending his patients, engages that he will use due care to discover the nature of the disease which gives occasion for his services, and in applying the usual remedies; but beyond this measure of skill and diligence the law makes no exaction. If he is to be held for results, or as a guarantor of success, it can be only in virtue of his express engagement. *Smith v. Hyde*, 10 Vt. 54. Ordonaux, in his Jurisprudence of Medicine, states the rule in question clearly. "The physician," he says, "is not a guarantor, without express contract of the good effects of his treatment, and he only undertakes to do what can ordinarily be done under similar circumstances. If the good effect of his treatment and the consequent value of his services be disputed, he must be prepared to show that his labor was performed with the ordinary skill and in the ordinary way of his profession. This is all the essential evidence upon which to found his case." *Ordr. Med. Jur.* 42. A further citation from the same author is in point: "If a physician ignorantly and unskillfully administer medicine, and the patient consequently derived no benefit from his attendance, the physician is not entitled to any remuneration for what he has done. But if he has employed the ordinary degree of skill of his profession, and has applied remedies fitted to the complaint, he is entitled to his hire and reward, although they may have failed in the particular instance." *Ord. Med. Jur.* 1-43. In *Hope v. Phelps*, 2 Stark. 480, Chief Justice ABBOTT, in summing up the jury, stated the ground upon which a recovery could be had for a physician's services, as follows: "In case of a regular practitioner who had used due care and diligence, his claim to remuneration depends not on the question whether he effected a cure. He would be entitled to pay for his services although he was unsuccessful." See further on this general subject *McClallen v. Adams*, 19 Pick. 333; s. c., 81 Am. Dec. 140; *Slater v. Baker*, 2 Wils. 359; *Leighton v. Sargent*, 27 N. H. 469; s. c., 50 Am. Dec. 388; 81 N. H. 119; *Gallagher v. Thompson*, Wright (Ohio), 466, *Seare v. Prentice*, 8 East, 348; *McCandless v. McWha*, 22 Penn. St. 261. It plainly appears then that the right of a physician to be compensated for his services and medicine does not depend upon the measure of his success in effecting a cure by the means employed, but upon the diligent exercise, under his employment, of the skill which commonly pertains to his profession. Such services cannot be regarded as other than beneficial. They are so in a legal sense; and the right to adequate compensation arises upon their rendition, wherever his fees are otherwise recoverable by suit at law. But it is said that this case is not within the rule; for conceding that failure in results of usual treatment does not disprove beneficial services, the patient is not treated for his disease. It is argued that if the disease of the patient be

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mistaken by the doctor, and his treatment be directed under that error, the services could not be meritorious or of value to the patient. It is to be observed that the bill of exceptions coming with this record gives us none of the evidence taken at the trial; and its statement on argument is entirely aside from the purposes which the writ of error is brought to serve. The bill states only that the suit was for a physician's bill, and the defendant gave evidence tending to show that the plaintiff had mistaken his disease and treated him for another disease; that the trial judge instructed the jury, that in itself this was an immaterial fact. Its value in the case, in connection with the consideration of skill and care, was stated in a subsequent part of the charge, and was not excepted to. The plaintiff in error claims the fact of such mistake to be both material and controlling in the case, but it can be so only upon the establishment of a proposition which I think has not before been asserted. Directly stated, it is that if after the exercise of due care and skill to discover the nature of his patient's disease, however obscure it may be, the physician errs in judgment, and determines inaccurately, and treats for the disease which appears to him to be that which afflicts his patient, a right to compensation never arises or is forfeited. The position, if correct, holds the physician to the duties and obligations of a guarantor in diagnosis. Ordinary skill and care will not suffice. Indeed the highest skill and diligence to which the best ever attain will not fill the measure of duty and requirement; but there must, in this branch of the science of medicine, be absolute certainty in its results, or no merit attaches to the services. No case asserts the doctrine that such an assumption is implied on his part in virtue of his professional employment. In legal theory it could only be so on the ground that an error in that branch of the medical art imports the absence of usual skill or care in every case. It cannot be maintained without direct hostility to the general rule, unless it be true that this branch of medicine is always capable of assured and exact determination in practice, and that the practitioner of customary skill cannot, with proper diligence, fail to distinguish the nature of each disease. There is nothing before us to show by admission or proof that such is the fact. We cannot on any ground known to us so conjecture. We are better justified in the inference that cases present themselves to the pathologist where the aid of the most consummate skill of the practitioner is required in determining the true cause to which to refer observed symptoms, with ground still left for possible error. There would seem to be no reason, and there is no authority, for holding that in the mistakes which the careful and skillful medical practitioner may make in judging upon the true interpretation of symptoms, there is to be found a more serviceable defense to a suit for compensation than can be found in mistakes and failures in the results of treatment. In all that pertains to the practice of the profession, the physician is subject to the one rule, and that rule was correctly stated in the instructions given to the jury on the trial.

MATTER OF PAGE.

(118 Ill. 576.)

Will—lost or destroyed—proof by one witness—declarations by testator.

The contents of a lost or destroyed will may be proved by one witness. Declarations by a testator, after execution of his will, are admissible in case of its loss, to show that it was not cancelled and to prove its contents. (*See note, p. 399.*)

PETITION to prove will. The opinion states the case. The petitioner prevailed below.

George W. Smith, for appellant.

A. B. Jenks and Wallace Smith, for appellee.

SCHOLFIELD, J. Joseph P. Maxwell died in Cook county on the 22d day of September, A. D. 1876, leaving surviving him a widow, Sarah J. Maxwell, and several children. No will being discovered at the time of his death, administration of his estate was granted to Benjamin V. Page and Sarah J. Maxwell. On the 26th day of October, A. D. 1881, Sarah J. Maxwell having discovered, as she alleged, within a few days of that time, that Joseph P. Maxwell made a last will and testament on or about the 1st day of August, A. D. 1876, which he left unrevoked at the time of his death, presented her petition to the Probate Court of Cook county that the same might be probated. The Probate Court made an order admitting the alleged will to probate, and that order was affirmed on appeal, to the Circuit Court of Cook county. An appeal was prosecuted from the order of the Circuit Court to the Appellate Court for the first district, and that court affirmed the judgment of the Circuit Court. The case is now before us by appeal from the last named judgment.

It is provided in our Statute of Wills (Rev. Stat. 1874, p. 1101), in section 2, that "all wills, testaments and codicils * * * shall be reduced to writing and signed by the testator or testatrix, * * * and attested in the presence of the testator or testatrix, by two or more credible witnesses." And section 6 provides, that in "all cases where any one or more of the witnesses to any will, testament or codicil, as aforesaid, shall die, or remove to parts

unknown to the parties concerned, so that his or her testimony cannot be procured, it shall be lawful for the County Court, or other court having jurisdiction of the subject-matter, to admit proof of the handwriting of any such deceased or absent witness as aforesaid, and such other secondary evidence as is admissible in courts of justice to establish written contracts generally in similar cases, and may thereupon proceed to record the same as though such will, testament or codicil had been proved by such subscribing witness or witnesses in his or their proper person." This, it will be observed, is not restricted to cases where the will is actually produced before the court. The language applies to all cases wherein a witness to the will or codicil dies; and the same reason that would exclude it from lost or destroyed wills would exclude the language requiring wills to be witnessed by two or more witnesses from such wills. But all wills are to be attested in the same way, and the only difference between wills that are produced in open court and those that have been lost or destroyed, is in the mode of proving their contents. The will that is produced shows what its contents are, but secondary proof must be made of the contents of a lost or destroyed will.

That the contents of a lost or destroyed will may be proved by the testimony of a single witness is settled in England since the decision in the great case of *Sugden v. Lord St. Leonards*, 17 Eng. (Moak's notes) 453. And like ruling has obtained in this country. *Dickey v. Malechi*, 6 Mo. 177; s. c., 34 Am. Dec. 130. And in this country the ruling in general is, that a will may be established by one only of the attesting witnesses, if he can testify to a compliance with the statute relating to its execution. *Welch v. Welch*, 2 T. B. Monr. 83; s. c., 15 Am. Dec. 126; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Vickory*, 1 Wend. 431; s. c., 19 Am. Dec. 122; *Lambert v. Hooper's Exrs.*, 29 Gratt. 61; *Jackson v. Legrange*, 19 Johns. 386; *Jauncey v. Thorne*, 2 Barb. Ch. 40; s. c., 45 Am. Dec. 424; *Thornton v. Thornton*, 39 Vt. 122. See also to like effect, in principle, *Doran v. Mullen*, 78 Ill. 342. And the fact that the will is destroyed or lost makes no difference in this respect, as will be seen by *Dickey v. Malechi*, *supra*, and *Dan v. Brown*, *supra*. *Sugden v. St. Leonards*, *supra*, also holds that declarations, written or oral, made by a testator after the execution of his will, are, in the event of its loss, admissible, not only to prove that it has not been cancelled, but also as secondary evi-

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dence of its contents. It has been held otherwise in New York, but this, in our opinion, is the more reasonable ruling. COCKBURN, C. J., in speaking of this question, among other things, said : " In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed, *animo revocandi*, when the will, having remained in the custody of the testator, is no longer forthcoming. Thus if a testator were to say, ' When I am dead, you will find my will in such a place,' or ' I have left my estate of Blackacre to my son John,' or ' I have left £5,000 to my daughter Mary,' such, or similar declarations, would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time they were made." And he then goes on to show that upon like principle such declarations are also admissible to prove the contents of the will, discriminating *Doe v. Palmer*, and overruling *Quick v. Quick*. To like effect see also *Hope's Appeal*, 48 Mich. 518.

The evidence here is complete as to the due formal execution of the will. Mr. Tourtelotte, a prominent member of the bar of the city of Chicago, testified, that about the 1st day of August, 1876, at the request of Joseph P. Maxwell he drew his will for him; that Maxwell then signed it in the office of Eldridge & Tourtelotte, in the presence of the witness and H. P. Fulton, that he (Tourtelotte) and Fulton witnessed Maxwell sign the will at Maxwell's request; that the witnesses then, in Maxwell's presence, and in the presence of each other, signed their names to the will, as witnesses thereto; that no one else was present at the time; that Maxwell was then of sound mind and memory; that after the will was signed by Maxwell and the witnesses, Maxwell took it away with him; that H. P. Fulton died in the spring of 1877. Tourtelotte gives a copy of the will. By it Maxwell devised his entire estate to his wife, adding this language : " To have and to use the same, and dispose of the same as she may deem best, having full confidence that she will deal justly by the children."

The presumption arising from the non-discovery of the will since the death of the testator is, that he revoked and cancelled it, and the question is, whether that presumption is overcome by the evidence here. Tourtelotte testified, that some time after he drew the will, a few weeks before the death of the testator, he and Maxwell talked about the will, and Maxwell said he then had it in a safe;

that the talk was in regard to whether Tourtelotte or Maxwell should keep the will, and Maxwell said, "he had it in a safe place, among his other papers." Philena Maxwell, a daughter of the testator, says in substance that about the last of August or first of September, A. D., 1876, her father and her mother and her sister were at Cleveland, and they returned within two weeks of the 22d of September, and he was then sick, and he remained sick until he died, on the 22d of September; that he never went to his place of business, nor left the house or his bed, after he returned; that after his return, and while he was thus on his death-bed, she heard conversations between him and her mother, in which he said that he expected to die, and that there was a will, and every thing would be left to her mother, at her discretion, for the good of the children. Thomas Maxwell, a son of the testator, says: "After father was taken sick, his last sickness, he did not leave the house; he was sick about two weeks; just before his sickness he was away; * * * he came home sick; * * * during father's last sickness I heard him say that there was a will; * * * he was talking to my mother; * * * that was a few days before he died; * * * I don't remember exactly what he said, in words, but what he meant to convey was, that he left a will and left her provided for, and the will was in her favor." Frank E. Maxwell, another son of the testator, says: "About four weeks before my father died he was going out of town. He said if any thing happened to him, that he should die, there was a will left at the factory of his."

No one contradicts either of these witnesses. If they have any interest in the event of the suit, they testify against it. No circumstance tending to affect their veracity is in evidence.

The will, it will be observed, was made only some six or seven weeks before the testator's death. There is not a circumstance in evidence tending to show subsequent dissatisfaction on the part of the testator with the will, or any attempt or wish to cancel or change it, but there are, on the contrary, these repeated declarations after it was made, from time to time, up to within a few days of his death, recognizing its continued existence. Why should he have spoken falsely in this respect, and this too in the face of impending death, realized by him? Not the shadow of an excuse is shown. We think the conclusion must be that the testator did not, contrary to all these assertions, intend to revoke and cancel the will. There is, it is true, the circumstance that he sent his son

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for a paper while he was lying sick, which he did not return to the safe; but this son could read, and says that he at one time saw among the papers an envelope indorsed "Will," and he does not pretend it was that paper which he carried to his father.

It is useless to discuss the facts further. Such circumstances have been pressed in argument, such as the fact that a previous memorandum for a will was not destroyed, and that the testator retained the custody of the will instead of leaving it with Tourtelotte, which we do not deem of any significance. In our opinion they are just as consistent with the truth of the repeated declarations of the testator as with the view claimed by appellant. It is not indispensable that we should determine what became of the will. It is enough that in our opinion it was not revoked or cancelled by the testator.

The judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—It was held in *Harris v. Harris*, 26 N. Y. 483, that at common law a lost will may be proved by a single witness; or by circumstances, *Schultz v. Schultz*, 35 N. Y. 658.

In *Johnson v. Hicks*, 1 Lansing, 150, it was held that declarations of the testator, before or after the will, are not admissible in proof of execution, on a question of genuineness of his signature.

The doctrine of the principal case as to the testator's declarations was held in *Southworth v. Adams*, 11 Biss. Circ. Ct. 256.

Schouler says (Wills, § 408), that declarations of the testator are admissible to show the contents of a lost will, but all the American cases cited by him in support of this are only to the effect that such declarations are admissible on the subject of revocation. These cases are *Johnson's Will*, 40 Conn. 587; *Lawyer v. Smith*, 8 Mich. 411; *Patterson v. Hickey*, 32 Ga. 156; *Pickens v. Davis*, 184 Mass. 252; *Collagan v. Burns*, 57 Me. 449.

See *Foster's Appeal*, 87 Penn. St. 67; s. c., 30 Am. Rep. 340.

CITY OF CHICAGO V. HULBERT.

(118 ILL. 632.)

Statute — pawn-broker — "property."

One who lends money of his own or of others, and takes security by mortgage on real or personal property, or by stocks, bonds or notes, is not a pawn-broker.

ACTION for penalty. The opinion states the case. The defendant had judgment below.

George Mills Rogers, for appellant.

C. Frank White, for appellee.

CRAIG, J. The city of Chicago has in force an ordinance, two sections of which are as follows :

"Sec. 1704. The mayor may, from time to time, grant licenses to such persons as shall produce to him satisfactory evidence of their good character, to exercise or carry on the business of a pawn-broker, or of a loan-broker or keeper of a loan office ; and no person shall exercise or carry on the business of a pawn-broker, loan-broker, or a keeper of a loan office, without being duly licensed, under a penalty of \$100 for each day he or she shall exercise or carry on said business without such license.

"Sec. 1705. Any person who loans money on deposit or pledge of personal property, or who deals in the purchase of personal property, on condition of selling the same back again at stipulated price, or who makes a public display at his place of business of the sign generally used by pawn-brokers to denote their business, to-wit, "three gilt or more or less yellow balls" or who publicly exhibits a sign of ' money to loan on personal property or deposit or pledge,' is hereby declared to be a pawn-broker."

Appellee, Thomas H. Hulbert, a resident of the city, a private banker, was and still is engaged in loaning money (both his own and that of others on commission), on real estate and furniture, horses, wagons, machinery, warehouse receipts, etc., without removal from the possession of the owner, and also in loaning money on watches, diamonds and jewelry. Under the agreed statement of facts it appears that the method employed, where an advance is made

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on jewelry, or other valuables of a similar nature, is as follows: The borrower makes an application at the office of said Hulbert for a loan, offering as security a watch (for example), and he is directed to have some reliable jeweler place a valuation on the watch and then, if it is deemed good security for the loan asked, he is requested to store it in some warehouse and get a warehouse receipt for it. On the borrower indorsing and turning over to said Thomas H. Hulbert this receipt, and executing his promissory note for the amount to be advanced, the loan is made.

Copies of the usual form of warehouse receipts, and of the promissory note used, are as follows, viz.:

"Warehouse Receipt issued by the Illinois Fire-Proof Warehouse, 46, 48 and 50 North Morgan street, near Lake street.

G. A. ROBINSON, Proprietor.

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"Received in store for account of , subject to order thereon, and surrender of this receipt.

"Perishable goods and loss or damages by elements, heat, leakage, mice, rats, fire, moths and shrinkage, at owner's risk.

"Goods subject to sale unless charges are paid within six months from date.

"Storage per month..... \$

"Insurance per month \$

"Advance charges
.....

"Total \$
.....

"Proprietor.

"\$100.

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"..... 1886, after date, for value received, I promise to pay to the order of dollars, at the office of Thomas H. Hulbert, in Chicago, with interest at per cent per annum until paid, having deposited with them as collateral security, which I hereby authorize and empower the said Thomas H. Hulbert, or his assigns, to sell on the maturity of note, or at any time thereafter, or before, said security being free from claim or incumbrance, and transferable by indorsement, with all its rights and privileges, at public or private sale, without giving notice, and to apply so much of the proceeds thereof to the payment of this

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note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said securities, including attorney's fees and commissions."

From the foregoing facts the question presented is, whether Hulbert is liable to the penalty imposed by section 1704, *supra*.

It appears from the stipulation found in the record, where the facts involved in the case have been agreed upon by the parties; that the defendant, Hulbert, is a private banker in the city of Chicago; that he loans money, for himself and others, on real estate and personal property security. We apprehend that a person may loan money in Chicago, and take, as security, a mortgage on real or personal property, without incurring any liability under the ordinances of the city, or without becoming a pawn-broker. This proposition is so obvious that no argument is needed in its support. But it is claimed that the defendant made loans and received personal property in pledge as security for the loan; that the warehouse receipts which were given to the defendant gave him the constructive possession of the property, and thus he may be regarded as one loaning on personal property actually placed in pledge, — in other words, that he may be regarded as a pawn-broker. Whatever disagreement may exist in regard to a correct or accurate definition of a pawn-broker in other States, that matter has been placed at rest here by an act of the legislature. Section 1 of an act approved June 4, 1879 (1 Starr & Curtis, 1369), provides "that every person or company engaged in the business of receiving property in pledge, or as security for money or other thing advanced to the pawner or pledger, shall be held and is hereby defined to be a pawn-broker."

The common council of the city of Chicago, under section 63, chapter 24 (1 Starr & Curtis' Stat.), page 466, has the power to license, tax, regulate, etc., hawkers, peddlers and pawn-brokers, but it has no power whatever to determine who is or may be a pawn-broker. And the fact that the city council has declared, by section 1705 of an ordinance, that a person engaged in a certain business is a pawn-broker, does not make him such. In order to be a pawn-broker he must fall within the definition given in the statute. Under the section of the statute heretofore cited, two important elements are required to constitute a pawn-broker: First, the person must be engaged in the business of receiving property in pledge for money advanced. An occasional loan will not be

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sufficient, but the person must so engage in the occupation that it may be known as his regular business or occupation. Second, the person must be engaged in receiving property in pledge, or as security for money or other thing advanced to the pawner or pledger. What was intended by the legislature by the use of the word "property," in the act? Was it intended to embrace lands, personal chattels, bonds, notes, money and stocks, or was the intention to give the word a more restricted sense, and confine it to articles of personal property? That the latter was the object we think is apparent. Lands are property, but it is plain they were not intended to be embraced in the word "property," as used, because they are mortgaged almost daily as security for money loaned, and the person taking such security has never been regarded as a pawn-broker. Bonds and stock and promissory notes could not have been intended, because they are pledged as security for money loaned by the banks all over the country, almost daily, and it has never been understood that our bankers are pawn-brokers; and yet such might be the result if the term "property" was used in an enlarged sense, and intended to include every species of property. We think the legislature intended by the use of the word "property" to include only such articles of personal property as might be actually delivered over to the possession and custody of the person who advanced the money, and not stocks, bonds, notes or mortgages, or choses in action, or evidences of debt. Here no article of personal property was delivered to the defendant. He took into his possession no article of personal property whatever. The transaction was this: The defendant loaned a certain amount of money, for which he received a note payable at a certain time. To secure the note, the person who obtained the money gave as collateral security a warehouse receipt. If this transaction constituted the defendant a pawn-broker, every banker in the State might be called a pawn-broker. All the banks, to a greater or less extent, make loans, and take as collateral, bonds, stocks, notes and mortgages, or warehouse receipts, and we think they have the right to do so without becoming pawn-brokers.

From what has been said, we think it is clear that the defendant was not liable to any penalty under the ordinances of the city,—that he cannot be regarded a pawn-broker so long as he receives no personal property in pledge for a loan.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PFISTER v. CENTRAL PACIFIC RAILROAD COMPANY.

(70 Cal. 169.)

Carrier — passenger — baggage — large amount of gold coin of county treasurer — statute — "messenger" — express facilities.

A railroad company is not bound to carry a large amount of gold coin as luggage of a passenger, although he is a county treasurer on his way to pay such coin to the State treasurer, and although it has carried such coin as luggage of such officers for some years, and although it allows an express company on the same train to carry such coin for hire. A county treasurer so carrying coin is not a "public messenger."

ACTION of damages for refusal to carry baggage. The opinion states the case. The defendant had judgment below.

J. J. Burt, for appellant.

W. H. L. Barnes, for respondent.

SEARLS, C. This is an action to recover from the defendant, a corporation, engaged in the business of a common carrier of passengers and freight for hire by cars drawn over a railroad by steam engines, damages in the sum of \$50,000 for refusal to carry certain treasure for plaintiff.

Defendant interposed a demurrer to the complaint, which was sustained by the court, and judgment, upon refusal by plaintiff to

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amend, was entered in favor of defendant, from which judgment this appeal is taken.

It appears from the complaint that the plaintiff was the county treasurer of the county of Santa Clara, and as such it was his duty to pay over and deliver to the State treasurer at Sacramento, California, certain funds due the State from him as such county treasurer.

On the 19th day of January, 1883, plaintiff purchased from the defendant at San Jose, in the county of Santa Clara, for \$16, four first-class passenger tickets, entitling four persons to first-class passage from said San Jose to Sacramento. Furnished with these tickets, plaintiff and three employees, having with them \$91,952 in gold coin of the United States, contained in small leather satchels, which they carried in their hands, boarded a passenger train of defendant with such treasure, and were permitted by the conductor, who had knowledge of the contents of the satchels, to retain possession of and carry the same as far as Niles, a way-station on the railroad leading to Sacramento, where it became necessary to change cars and take another train for the latter place.

The conductor of the train from Niles refused to permit plaintiff and his employees to enter the passenger car with their treasure, and required plaintiff, if he desired to carry said money to Sacramento, to deliver the same to Wells, Fargo & Co., an express company, engaged as common carriers for hire in the business of carrying treasure and that class of goods known as "express matter" over the railroad of defendant from San Jose to Sacramento, and to which company defendant had given the exclusive privilege of carrying money upon its trains from San Jose to Sacramento, so far as such money exceeded such sums as might be carried by a passenger travelling on its trains.

Defendant had provided accommodations for Wells, Fargo & Co. in a baggage-car, had not provided any special cars for persons generally having money to carry to Sacramento, and all such persons under the rules and regulations of defendant were obliged to give up to Wells, Fargo & Co., for transportation, all money outside of that which they could carry as passengers.

Plaintiff at first refused to surrender his money to Wells, Fargo & Co., and insisted that he and his employees had a right to go into some car of the train without any extra charge for carrying the money beyond their regular passenger fare, but at the same time told the conductor that rather than be left at Niles or give up the

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custody of his treasure to Wells, Fargo & Co., he would go into the baggage or any other car of defendant which might be designated, and would pay to defendant any charges which might be exacted for the transportation of the money, all of which was refused, and plaintiff thereupon, to avoid being left at Niles, delivered the money to the express company for transportation to Sacramento, paying for such transportation the sum of \$68.95.

The money which plaintiff was carrying was funds which he as county treasurer had received, and was conveying to Sacramento, to pay over to the State treasurer, being due from him in his official capacity to the State of California, and his employees were taken along as guards of said money and to aid in carrying the same, all of which was known to defendant.

It had been the custom of the defendant for ten years prior to January 19, 1883, to permit the county treasurer to carry like money in like satchels upon its passenger trains free of charge, and no notice was given to plaintiff of any change in such custom.

At the date when said money was carried to Sacramento, the defendant did not receive and transport money as freight; did not permit persons to travel on its freight trains and carry money as freight; would not check and carry the same as baggage on its passenger trains, and would not have received said money for transportation as freight, baggage or otherwise, and the only way by which the plaintiff could have transported his money to Sacramento by said railroad was by carrying it himself or by delivering it to Wells, Fargo & Co. for transportation, as required by defendant.

The complaint further proceeds to show in apt language that the defendant is subject to, bound by, and by express agreement duly filed has accepted and is bound to execute on its part the duties and discharge the obligations imposed by an act of the legislature of the State of California, approved April 4, 1864, entitled "An act to aid the construction of the Central Pacific railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto," and shows that the railroad from San Jose to Sacramento is a portion of the railroad to which said act of the legislature is applicable.

The defendant was a common carrier of passengers and freight between San Jose and Sacramento, and upon receiving the reasonable and customary payment therefor, it was its duty to receive and carry upon its passenger trains all persons desiring to travel thereby,

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with a reasonable amount of luggage for each passenger without charge, except for an excess of weight over one hundred pounds. Civ. Code, § 2180. "Luggage may consist of any articles intended for the use of a passenger while travelling or for his personal equipment." Civ. Code, § 2181.

"The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property." Civ. Code, § 2182.

A common carrier by railroad must check and carry in a regular baggage-car the luggage of passengers over his road, and must deliver such luggage immediately upon the arrival of the passenger at his destination; and whenever passengers neglect or refuse to have their luggage so checked and transported, it is carried at their own risk. Civ. Code, § 2183.

The question of whether money can or cannot be treated as luggage has been frequently determined by the courts, and usually to the effect that except, as to such limited amount as may be necessary for personal use to defray expenses of the passenger, it is not luggage. *Orange Co. Bank v. Brown*, 9 Wend. 85; s. c., 24 Am. Dec. 129; *Pardee v. Drew*, 25 Wend. 459; *Miss. Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Smith v. Boston & Maine R. Co.*, 44 N. H. 325; *Cinn. & Chicago Air Line R. Co. v. Marcus*, 38 Ill. 219; *M. S. & N. I. R. Co. v. Oehm*, 56 Ill. 293; *Jordan v. Fall River R. Co.*, 5 Cush. 69; s. c., 51 Am. Dec. 44; *Hawkins v. Hoffman*, 6 Hill, 586; s. c., 41 Am. Dec. 767; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Hutchings v. Western, etc., R. Co.*, 25 Ga. 61; s. c., 71 Am. Dec. 15.

Some of the cases cited *supra* hold that neither money nor merchandise is included in the term "baggage." We do not find it necessary however to decide that precise point in this case. The terms "baggage" and "luggage" signify one and the same thing.

The former is the term in general use in the United States, while in England the latter prevails. Our Code has adopted the English expression.

We think it clear, alike from section 2181 of the Civil Code and from adjudicated cases, that money intended for trade or business or investment, or as in this case, for transportation, and not intended for the use of the passenger while travelling, is not luggage.

It follows that plaintiff and his employees had no right to transport as luggage the money in question upon the passenger and express train of defendant.

The right of plaintiff as a passenger must be determined by the contract he made with defendant.

He purchased four first-class passenger tickets from San Jose to Sacramento which entitled him and his three employees to transportation in the first-class passenger coaches of defendant between the points indicated, and gave to them a right to have their luggage, not exceeding one hundred pounds to each person, transported at the same time free of charge.

It gave to them no right to travel in a baggage, express, or freight car, but in the regular passenger-car or cars of the defendant, and the contract gave to them no right to transport, either in their own charge or that of the defendant, any merchandise, or property not included in the term "luggage."

The law takes no note of what property a passenger carries upon his person, but beyond this he may not by virtue of his contract for passage carry, either free of charge or by paying an extra charge, property not included within the import of the term "luggage."

Were it otherwise, it would be within the power of the passenger to convert the passenger-coaches of a railroad company into vans for the transportation of merchandise, or to compel the carrier to do much the same thing by furnishing baggage-cars for the carriage of ordinary freight.

The orderly and expeditious transit of passengers and their baggage renders it necessary and proper for the carriers engaged in their transportation to run separate trains for their accommodation, or at least to furnish and transport them in cars separate from those devoted to the carriage of freight; and this result can only be accomplished by requiring the carrier on the one hand, and the passenger upon the other, to refrain from making passenger-cars the receptacle for merchandise.

Plaintiff must be presumed to know the legal effect of the contract he had made, and be subject to its terms, conditions and limitations equally with the defendant.

The fact that for ten years the defendant had permitted the county treasurers of Santa Clara county to carry with them upon its passenger trains the money which they were by law required to pay over to the State treasurer neither enlarged nor abridged the contract between it and plaintiff.

If defendant was not legally bound to extend this favor, its liberality to others or to plaintiff himself could not be urged as a binding rule for the continuance of such practice.

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The theory of plaintiff, that by having accepted him as a passenger with knowledge of the money he had with him the defendant became a common carrier of him and his money, though he retained possession of the latter, is not sustained by the authorities cited. *Minter v. Pacific R. Co.*, 41 Mo. 204; *Butler v. Hudson R. R. Co.*, 3 E. D. Smith, 571; *Sloneman v. Erie R. Co.*, 52 N. Y. 429; *Sloman v. G. W. R. Co.*, 67 N. Y. 208; and *Hannibal R. Co. v. Swift*, 12 Wall. 262, were all cases in which the property was delivered to the carrier, and although not baggage, it was held that having received it with knowledge that it was not the ordinary travelling baggage of the passenger, the liability of a common carrier attached.

We are clearly of opinion that the defendant was under no obligation by virtue of its contract of passage with plaintiff as an individual to permit him to carry with him in its passenger-car the sum of money indicated in the manner indicated, and weighing, as it must have done, between three hundred and four hundred pounds.

Whether independent of contract the defendant was or was not, as a common carrier, in duty bound to receive and transport the money of the plaintiff depends upon other considerations affecting such duty and will be considered hereafter.

But appellant contends:

2. That if as a private citizen the treatment of plaintiff would have been right, still, as the treasurer of the county of Santa Clara with money belonging to the State to be paid into the State treasury, he occupied a different position, and was, as such treasurer, entitled to take the money to Sacramento, the capital of the State and official residence of the State treasurer.

As county treasurer it was his duty to safely keep the public funds in his custody, and at stated intervals to settle with the controller, and to pay over in cash to the State treasurer the sum found due to the State. This duty presupposes the necessity of a visit in person at Sacramento and the delivery there of the amount due the State, and the county treasurer is responsible personally and upon his official bond until the money is so paid.

The defendant, if within the purview of the act of April 4, 1864, and under the allegations of the complaint, which are to be taken as true, we shall so regard it, was bound, in consideration of certain obligations assumed by the State of California and of certain privi-

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leges extended to it to "transport and convey over their said railroad all public messengers, convicts going to the State prison, lunatics going to the State insane asylum, materials for the construction of the State capitol building, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion or insurrection, as well as at all other times, also transport and convey over their said railroad all troops and munitions of war belonging to the State of California free of charge, and without any other compensation than as herein provided." (Stats. 1863, 64, p. 344.) If plaintiff was entitled to a free passage or to carry the money in question under this law, it must have been because he was a public messenger.

A messenger is defined by Webster to be "one who bears a message or an errand; the bearer of a verbal or written communication, notice, or invitation from one person to another or to a public body; an office servant."

The term, by its fair import and significance, does not apply to a public officer acting in an original capacity in the discharge of duties imposed upon him by law, but presupposes a superior in authority whose servant the messenger is and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior.

If a county treasurer is to be treated as a public messenger, we see no good reason why legislators and State officers, having enjoined upon them the duties requiring their presence at the State capital, may not with equal propriety be entitled to free conduct as "public messengers."

Under the nineteenth section of the twelfth article of our State Constitution, "no railroad or other transportation company shall grant free passes, or passes or tickets at a discount to any person holding an office of honor, trust, or profit in this State, and the acceptance of any such pass or ticket by a member of the legislature, or any public officer other than railroad commissioner, shall work a forfeiture of his office."

We do not think the term "public messenger," as used in the act in question, applied to or conferred any rights upon the plaintiff as county treasurer of the county of Santa Clara.

It only remains to inquire whether or not defendant, as a common carrier, was derelict in duty in refusing to permit plaintiff, upon

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offer of compensation therefor, to carry his money in the baggage-car as freight, he retaining the custody thereof, such car being used by Wells, Fargo & Co. as a receptacle for its express matter by consent of the defendant.

Defendant was, at the date of the alleged refusal, according to the averments of the complaint, "engaged in and carrying on the business of a common carrier of passengers and freight for hire by cars," etc., "over its railroad."

"A common carrier must, if able to do so, accept and carry whatever is offered to him at a reasonable time and place of a kind that he undertakes or is accustomed to carry." Civ. Code, § 2169.

"A common carrier must not give preference, in time, price, or otherwise, to one person over another," etc. Civ. Code, § 2170.

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered. That class of carriers known as transfer companies, engaged in receiving and transferring the baggage of passengers to and from public conveyances by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel-delivery express company need not receive and deliver hay, lumber or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities.

In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."

The defendant did not undertake — that is to say, did not promise or agree — to carry defendant's money; indeed it was not asked to do so, except to permit the plaintiff to retain charge of and carry it in the car, and there is nothing in the complaint showing, or tending to show, that defendant was accustomed to carry, or ever did carry, or offer to carry, money as freight or baggage; on the contrary, the express averments of the complaint are to the effect "that the defendant has always refused to receive money as freight for transportation" over this route, or to allow any person to travel and carry money on its freight cars, or to check and carry money as baggage on its passenger cars.

The problem is therefore practically narrowed to a consideration of this question.

Defendant had accorded to Wells, Fargo & Co. the privilege of carrying in its baggage car property of the same kind with that possessed by the plaintiff, and of retaining possession thereof while in transit.

Under the circumstances presented by the complaint, was it the duty of defendant to extend like facilities to the plaintiff?

The express business, as understood and carried on in the United States, is said to have been inaugurated by Alvin Adams in the year 1839. It at first involved the carriage of small packages of value between important cities, and proving convenient to the public and remunerative to those engaged in the business, it gradually expanded in volume and importance, until upon all the great thoroughfares of the country, whether by land or water, one or more companies was to be found engaged in the receipt, carriage and delivery of property varied in character and including that of great value in small compass, articles requiring special care to protect them from injury or theft, perishable goods requiring speedy transit and immediate delivery, and a variety of others, all known as "express matter."

The business has continued to increase until it has become a prime factor in satisfying the wants of advancing civilization, and has demanded and received from transportation companies the facilities essential to its importance and successful execution. Among these are the allotment of express cars, and space in baggage cars attached to passenger trains, for the speedy transportation of this class of freight by railroad companies, and the transportation of messengers, the employees of the express companies, in whose custody and possession the property is retained during transit.

The duties of railroad carriers are confined to the receipt, carriage and delivery of such freights as are appropriate to such a mode of transportation, and in the absence of some special provision in their charter or in the law under which they are organized, railroad companies are not bound as carriers of property to receive and carry money, gold or silver bullion, bonds, bank notes, jewelry, valuable papers or other property not appropriate to the mode of transportation in vogue by such companies. *Southern Ex. Co. v. Nashville Ry. Co.*, 20 Am. Law. Reg. (N. S.) 596.

Doubtless the growth and expansion of the express business is largely due to the fact that its successful conduct calls for the exer-

cise of powers and furnishing of facilities not possessed in any ample degree by railroad carriers.

Be this as it may, the express business, as was said in *Southern Ex. Co. v. Nashville Ry. Co.*, 20 Am. Law Reg. (N. S.) 598, "is only second in importance to railroad transportation; and that the express business has so interwoven itself into the present methods that it cannot be dispensed with without producing an abrupt and disastrous revulsion in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity. * * * It has attained its present enlarged usefulness under the fostering care of the railroads themselves. * * *

"The right of the public to have quick, reliable and safe carriage of goods through expressmen has been recognized for forty years. This general recognition by the public and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage."

The carriage of such freights for express companies is demanded by the wants of the public, and is in the strict line of railroad duty.

An application of the principle which involves the duty of railroad companies to avail themselves of the discoveries of modern science and skill for the safe and speedy transportation of passengers and freight may well require them to so adjust their facilities for accommodating the public that its advancing wants may be supplied, and the mutual interests of all parties may be subserved.

The defendant has recognized and discharged this duty so far as to accord to Wells, Fargo & Co. all necessary facilities for conducting an express business over its railroad.

Having thus provided for the accommodation of the public with express facilities, the contention of defendant is, that the full measure of its duty is discharged, and that to require it to extend to each individual who may apply and be willing to pay therefor like facilities would, owing to the peculiar requirements demanded, be subversive of legitimate trade, impose upon defendant burdens not easily borne, and in nowise benefit individuals demanding such privileges.

It does not appear from the complaint that the sum charged by Wells, Fargo & Co. for the transportation of his money was in excess of the value of the services rendered, or in excess of the sum which might reasonably have been exacted from him by defendant had it permitted him to retain possession of his money and to travel with it in the baggage-car devoted in part to express matter.

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If therefore plaintiff has been injured and damnified, it must be upon the principle that he, in common with all other persons, had a right to possession of his property while in transit, and to all the privileges and facilities extended to the express company for the transportation of like property.

This question was involved in three cases recently presented to the Supreme Court of the United States, and decided by that tribunal, known as the *Express* cases, and severally entitled: *St. Louis, I. M. & S. Ry. Co. v. Southern Express Co.*; *Memphis & L. Rd. Co. v. Southern Express Co.*, and *Missouri K. & T. Ry. Co. v. Adams Express Co.*, 117 U. S. 1.

These causes were each brought by an express company against a railway company to compel the latter to afford it the same express facilities it had formerly enjoyed under a contract then abrogated. The several Circuit Courts from which the cases were appealed had each entered a decree in favor of the express companies, in which it was held among other things:

"1. That the express business * * * is a branch of the carrying trade, that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized so as to require the court to take notice of the same, as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"2. That it has become the law and usage and is one of the necessities of the express business that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

"3. That to refuse permission to such messenger or agent to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to him the right to the custody of the property while so carried would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messenger or agents.

"7. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains."

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The Supreme Court, in the opinion delivered by Chief Justice WAITE, reviews the growth and importance of the express business, recognizes the fact that it could not be destroyed without interfering materially with business and the conveniences of social life, refers to the fact that railway companies recognize the right of the public to demand transportation facilities by the railways which the public has permitted to be created of that class of freight known as "express matter," and then proceeds to show the inconveniences that would follow were the railroad companies obliged to furnish express facilities to all applying for them, its interference with passenger traffic, and concludes that "the railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodation.

"If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." And holds that in the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish express facilities to all alike who demand them.

The inconveniences which would follow from requiring railroad companies to extend equal express facilities to all persons, companies and corporations regularly engaged in the express business would be multiplied beyond measure were they, either with or without previous notice, required to furnish like accommodations to each individual who might at any time, and for a single trip, see fit to demand them.

Railroad companies owe important duties to the public, the discharge of which in their letter and spirit should be rigorously enforced by every department of the government to which authority in the premises is delegated, but to uphold the claim of plaintiff would establish a principle onerous to railroad companies and at the same time detrimental to the speedy and orderly conduct of a branch of the carrying trade in which the public is most concerned.

We are of opinion the demurrer to plaintiff's complaint was properly sustained, and that the judgment should be affirmed.

FOOTE, C., and BELCHER, CC., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

LAFARGUE V. HARRISON.

(70 Cal. 389.)

Negotiable instrument — letter of credit — guaranty to third person.

Defendants addressed to the M. bank a letter stating that at the request of M. & Sons, the defendants authorized L. & Co. to draw on said bank on defendant's account to a specified amount, for twelve months. This letter was deposited by M. & Sons with the plaintiff as security for advances. *Held*, that the defendants were liable thereon as on a guaranty

ACTION on a letter of credit. The opinion of Commissioner FOOTE states the facts. The plaintiff had judgment below.

Wilson & Wilson, for appellants.

McAllister & Bergin, for respondents.

The COURT.—For the reasons given in the opinion filed herein December 30, 1885, judgment and order affirmed.

THORNTON, J., dissented.

The following is the opinion above referred to, rendered in bank:

FOOTE, C. From the record in this action it appears that in the year 1877, John Mel & Sons, being engaged in a general commission business in the city of San Francisco, having a branch house in the city of Bordeaux, France, and doing their banking business with Lafargue & Co., the plaintiff in this action, obtained from the defendants then doing business under the name and style of Falkner, Bell & Co., a letter of credit as follows:

“SAN FRANCISCO, *Sept.* 20, 1887.

“THE MERCHANTS' BANKING COMPANY OF LONDON (LIMITED), 112 CANNON STREET. LONDON.—*Dear Sirs*—At the request of Messrs. John Mel & Sons of this city, we hereby authorize Messrs. A. Lafargue & Co., of Bordeaux, to draw on you at sixty days' sight for our account to the amount of three thousand pounds sterling (£3,000).

“All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months, from 31st October, 1877, to 31st October, 1878.

“We are, dear sir, yours faithfully,

“FALKNER, BELL & Co.”

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Of the issuance thereof, Lafargue & Co. and the bank above mentioned were duly advised. Mel & Sons deposited the letter in the bank of Lafargue & Co. as a guaranty or security for advances that might be made by that bank to them, and upon the faith and credit of such guaranty, and of another on the part of some ladies, the relatives of the Mels, which was also at the same time so deposited, Lafargue & Co., between the times mentioned in the letter of credit as the period during which it was to remain in full force and effect, made advances to Mel & Sons in the sum of 99,645 francs and 60 centimes, equivalent to the sum of \$19,231.53 of the money of the United States of America, of which sum the other guarantors above mentioned paid plaintiffs 30,000 francs leaving unpaid 69,645 francs and 60 centimes, equivalent to the sum of \$13,441.54 in money of the United States.

On the tenth day of October, 1878, on the faith of the said letter of credit, and for liabilities contemplated by the parties at the time of the issuance thereof, the plaintiffs drew a bill of exchange, which translated into the English language reads as follows:

“B. P. £3,000.

BORDEAUX, *October 10, 1878.*

“At sixty days’ sight, pay on the single of exchange to our order the sum of three thousand pounds sterling, value received by us, which charge according to the letter of credit of Messrs. Falkner, Bell & Co. dated San Francisco, September 20, 1877.

(Signed)

“A. LAFARGUE & Co.

“The Merchants’ Banking Co. of London (Limited), 11½ Cannon street, London.”

This draft the pleadings admit to have been accompanied by a letter of advice and notice. It was presented on the 14th of October, 1878, to the London bank for acceptance, which was refused. On the 16th of December, 1878, it was presented to that bank for payment, which was also refused. Thereupon it was protested for both non-acceptance and non-payment. Lafargue & Co. brought this action to recover from the defendants the amount of that draft, basing their demand upon the obligations imposed upon Falkner, Bell & Co., by virtue of the terms of the letter of credit.

Judgment for the amount claimed was rendered in favor of the plaintiffs; the defendants entered their motion for a new trial, and it was denied. From the order made in the premises and the judgment, the defendants appealed.

Letters of credit are general or special, and whether one partakes of the characteristics of the former or the latter class depends upon the reasonable construction to be placed upon the language specially employed therein.

Daniel on Negotiable Instruments, at page 666, vol. 2, says:

"A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will guarantee the same to the person making the advancement.

"It is called a general letter of credit when it is addressed to all persons in general, requesting such advance to a third, and a special letter of credit when addressed to a particular person by name.

"When addressed to all persons, it is in effect a request made to any person to whom it may be presented, and any one may accept and act upon the proposition contained in it, and when he does so, that which before was indefinite and at large becomes definite and fixed. A contract immediately springs up between the person making the advancement and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter in the beginning." *Birchhead v. Brown*, 5 Hill, 643.

And the same legal effect follows action by the person to whom a special letter of credit is addressed. He has the right to act upon it, and when he accepts the letter placed in his hands by the person for whose benefit it was written, and gives him credit in compliance with it, there springs from the letter and its acceptance a distinct contract, which is auxiliary to the principal contract, between the person for whose benefit the letter was written and the person to whom it was addressed, which is binding upon the writer of the letter. And this writer is upon the default of the debtor liable to those who gave credit in accordance with its terms. Civ. Code, § 2860.

It is contended by counsel for the defendants that the one in hand is a special letter of credit, and that no privity exists between the writers thereof and the plaintiffs.

The question then to be determined is, whether or not the proposal or proposition contained in that letter was intended to be made, or what is the same thing in legal effect, could from its verbiage reasonably be construed to be intended to be made to Lafargue & Co.

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“To construe the words of such instrument with wise and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. *Lawrence v. McColmont*, 2 How. 426.

We must look then at the letter itself, and give to its terms and the language employed a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made. If there is any thing ambiguous in it, it should be taken most strongly against the parties who have induced Lafargue & Co. to act upon and give credit to their supposed intent. *Belloni v. Freeborn*, 63 N. Y. 383.

What was the proposition fairly deducible from the language of that letter? It is this:

We guarantee the credit of Mel & Sons for twelve months, from October 31, 1877, until October 31, 1878, to the amount of £3,000 sterling, and for that amount we authorize Lafargue & Co. at Bordeaux to draw on the Merchants' Bank of London (Limited) for our account by sixty days' sight draft or drafts, the same to be drawn at Bordeaux.

In other words, Falkner, Bell & Co. said to Lafargue & Co.: Give Mel & Sons credit in your bank to the extent of £3,000, and draw for it draft or drafts at Bordeaux upon the Merchants' Bank of London (Limited), and we will guarantee their acceptance and payment at that bank, provided they are drawn at sixty days' sight, are accompanied with due advice and notice to that bank, and are drawn between the 31st of October, 1877, and the same date in 1878.

This proposition thus made and accepted by Lafargue & Co. was, we think, sufficient to create a contract between the writers and Lafargue & Co.

If A. says to B., “advance so much money to C., and I will repay you,” it is an original promise, and if the money is paid upon the faith of it, it has been always held an obligatory promise. *Townsley v. Sumrall*, 2 Pet. 182.

Where the evidence showed the credit to have been given upon the faith of a letter by the person for whom the letter was intended, Chief Justice MARSHALL said:

“The writing was certainly intended by the defendants to give a credit to another. The defendants are bound by every principle of

moral rectitude and good faith to fulfill the expectations which they thus raised, and which induced the plaintiffs to part with their property." *Lawrason v. Mason*, 3 Oranch, 492.

If one of two must suffer, it should be the one from whose act the injury results.

If Lafargue & Co., acting in good faith, had a right reasonably to infer from the language of Falkner, Bell & Co.'s letter that they were authorized to give credit to Mel & Son, as they did, and that the drafts specified in that instrument would be paid by the London bank, then common justice requires the defendants should make good their guaranty; and since by their act in revoking the letter of credit the bank failed to pay the plaintiffs' draft, they should assume the place of the bank and pay it.

There is no case which we have had cited to us, or which we have been enabled to find, which in all respects is similar to the one under consideration. But that which most closely resembles it is *Carnegie v. Morrison*, 2 Metc. 381. There a Boston merchant was indebted to some merchants in Gottenburg, Sweden, and procured from the agent in Boston of a banking-house in London a letter of credit as follows:

BOSTON, *March 4, 1837.*

MESSRS. MORRISON, CRYDER & CO., LONDON:—"Mr. John Bradford of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gottenburg for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions. Respectfully, your obedient servant,

"FRANCIS J. OLIVER."

The London bankers were advised of the issuance of the letter, and that it would be forwarded to Carnegie & Co.; and it was forwarded to them by the party in whose favor it was written, and he requested them "to value for the amount of £3,000 at ninety days' sight, and pass the same to his credit." Replying upon this letter of credit, Carnegie & Co., and in compliance with its terms, drew a bill on the London bankers, which was presented for acceptance and payment, and both refused. Carnegie & Co. then instituted an action to recover the amount of that draft, basing their right of recovery on the letter of credit. The defendants alleged that they were under no obligation to pay Carnegie & Co.; that no contract existed between them. Chief Justice SHAW said upon that point,

among other things: "The objection to such an action and the grounds of this defense are, that the immediate parties to the transaction were Bradford (the person in whose favor the letter was written) on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers, and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him, and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others who may subsequently assent to and become interested in its execution — an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee that he will pay him the amount if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A. deposits money with B. to the use of C., the latter may have an action against B., though they are in fact strangers.

But if C., not choosing to look to B. as his debtor, calls upon A. to pay him notwithstanding such deposit (as he may), and A. pays him, A. shall have an action against B. to recover back the money deposited if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. *Hall v. Marston*, 17 Mass. 579.

In 2 Metcalf, 403, the learned judge continues as follows: "The court are of opinion that the promise of the defendants made by the letter of credit in the present case comes within the principle of the cases cited. Bradford was indebted to the plaintiffs, and was desirous of paying them; and he must resort to some mode of remittance. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking he forebore to adopt other measures to pay the plaintiffs' debt. He gave the plaintiffs notice of what he had done and sent them the instrument as authentic evidence of the fact. They as-

sented to and affirmed it as an act done in their behalf, and gave the defendants notice thereof, and conformably to the terms of the letter of credit, drew their bills on the defendants. The refusal to accept was a breach of the promise thus made, and in the event that happened (the insolvency of Bradford), the plaintiffs lost their debt. It would be in vain to say that this promise was not made for the benefit or (according to the terms of some of the cases) for the interest of the plaintiffs. The result shows that by a compliance with the plain, literal terms of their promise on the part of the defendants the plaintiffs could have received their debt. By a refusal to perform that promise they have lost it. They are therefore damnified to the full amount of the sum for which the credit is given."

To much the same effect is the reasoning of the courts in *Russell v. Wiggin*, 2 Story, 213; *Lonsdale v. Lafayette Bank of Cincinnati*, 18 Ohio, 126; *Barney v. Newcomb*, 9 Cush. 59; *Scott v. Pilkington*, 15 Abb. Pr. 281.

We have examined with great care and much admiration for their research, perspicuity of expression and strength of argument, the various briefs of the distinguished counsel in this cause.

We rise from their study profoundly impressed with the belief that the plaintiffs, from the terms of the letter of credit under consideration, had a legal right to expect that the drafts drawn by them on the London bank would be paid by that bank, or that this failing, the defendants must make good to them the loss thus incurred as they had promised.

"By a refusal to perform that promise" on the part of the defendants, the plaintiffs lost their debt.

"They are therefore damnified to the full amount of the sum for which the credit was given."

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

SEARLS and BELCHER, CC., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Judgment affirmed.

Lewis v. Adams.

LEWIS V. ADAMS.

(70 Cal. 408.)

Executor and administrator — action by foreign executor.

An executor appointed in Texas may maintain an action in California in his own name upon a judgment recovered by him as such executor in Texas.*

ACTION on a judgment. The opinion states the point. The defendant had judgment below.

Victor Montgomery and Smith, Brown & Hutton, for appellant.

Thom & Stevens, for respondent.

McKINSTRY, J. The action is upon a judgment of a District Court of the State of Texas, a court of general jurisdiction.

[Omitting other points.]

Another point urged by respondent is, that the Superior Court erred at the trial in overruling defendant's objections to the evidence offered by the plaintiff. Assuming that the specifications of error in the statement for new trial are sufficiently particular, the evidence referred to as offered by the plaintiff is the record of the Texas judgment. When that record was offered, the defendant's objections to it — other than those already incidentally referred to — were:

"1. Because the document shows a judgment in favor of M. F. Lewis, executrix of the estate of Nat. Lewis, deceased, and it appears therefrom that the plaintiff, as executrix, appointed in Texas, has no jurisdiction nor right to maintain an action in this State.

"2. Because the court has treated this action as an action in the name of M. F. Lewis as an individual, and has held the description of plaintiff's official capacity to be mere surplusage."

Section 1294 of the Code of Civil Procedure, so far as it relates to any question before us, is: "Wills must be proved and letters testamentary or of administration granted * * * 3. In the county in which any part of the estate may be, the decedent having died out of the State, and not resident thereof at the time of his death." And sections 1667 and 1913 of the same Code read:

* See *Campbell v. Brown* (64 Iowa, 425), 52 Am. Rep. 446.

"1667. Upon application for distribution * * * and if it is necessary * * * that the estate in this State should be delivered to the executor or administrator in the State or place of his residence, the court may order such delivery to be made," etc. "1913. The effect of a judicial record of a sister State is the same in this as in the State where it was made, except * * * that the authority of * * * an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority."

Respondent contends, that by virtue of the foregoing provisions the plaintiff cannot maintain this action, either in her official capacity or as an individual, and that the action could only have been prosecuted by one to whom letters were issued under the third subdivision of section 1294.

It is claimed this view is supported by *Dial v. Gary*, 14 S. C. 573; s. c., 37 Am. Rep. 737. In that case, a resident of Massachusetts having died in that State, possessing a bond and mortgage executed by a resident of South Carolina, the administrator appointed in Massachusetts assigned the securities to a resident of South Carolina. The Supreme Court of South Carolina held that an action could not be maintained on them by the assignee in that State. The action was not upon a judgment recovered in Massachusetts.

Respondent also refers to Story's Conflict of Laws. In section 513 of that work, Judge Story says it has become a doctrine of the common law that no suit can be brought or maintained by any executor or administrator, in his official capacity, in the courts of any other country than that from which he derives his authority. But at section 522 the learned author remarks that in contemplation of law there is no privity between persons to whom administration is granted in different States; that a judgment recovered by a foreign administrator against the debtor of his intestate will not form the foundation of an action by an ancillary administrator in another State; but the foreign administrator himself might in such case maintain a personal suit against the debtor in another State, because the judgment would, as to him, merge the original debt, and make it personally due to him in his own right, he being responsible therefor to the estate.

In *Attorney-General v. Bowens*, 4 Mees. & W. 171, Lord ABINGER, speaking of conflicts of jurisdiction between different ordinaries,

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said it had been established that judgment debts were assets for the purposes of jurisdiction where the judgment is recorded.

Mr. Freeman, citing authority, thus lays down the rule with respect to the right of a foreign administrator to sue personally in this State on a judgment recovered by him as administrator out of this State: "A debt due to the estate of a deceased person, if sued upon and recovered by an administrator, is in law the debt of him who recovers it, and in whose name the judgment is rendered. He holds the legal title, subject only to his trust as administrator. He may sue upon the debt in his own name without describing himself as administrator, and may therefore pursue the judgment defendant in a different State from that in which letters of administration were issued." Freeman Judgments, § 217.

That the local administrator could not maintain an action on a judgment recovered by a foreign administrator, as such in another State was decided in *Talmage v. Chapel*, 16 Mass. 71. There the court held: 1. The judgment debt was at law due to the foreign administrator, he being answerable to the estate of the intestate; 2. That the ancillary administrator appointed in Massachusetts could not maintain an action on the judgment, not being privy to it. Counsel for respondent herein criticise that decision, saying: "It is absurd to say that by recovering a judgment the administrator becomes chargeable with it." And counsel claim that an executor or administrator appointed here could sue here on the judgment, because the foreign judgment is in favor of the estate which such an executor or administrator would represent. But the Supreme Court of Massachusetts did not hold that the foreign administrator was chargeable with the judgment in the sense that he was bound absolutely to satisfy and pay it, but that he was answerable to the estate to the extent of using all reasonable efforts to collect the judgment. It would seem sufficiently plain that the Massachusetts administrator was not in privy with the title of the foreign administrator to the judgment, or with that of the person who had recovered the judgment, and to whom at law the judgment debt was personally due.

In *Biddle v. Wilkins*, 1 Pet. 686, the plaintiff, as administrator of one W., had recovered a judgment against the defendant in the District Court of the United States for Pennsylvania. He instituted a suit on the judgment in the District Court of the United States for Mississippi. The defendant pleaded that he had been appointed

administrator of the estate of W. by the Orphans' Court of Adams county. The Supreme Court of the United States held that the debt due upon the judgment obtained in Pennsylvania by the plaintiff as administrator of W.'s estate was due to him in his personal capacity, and it was immaterial whether the defendant was or was not appointed administrator of the estate of W. in the State of Mississippi.

In *Low v. Burrows*, 12 Cal. 188, the Supreme Court of this State said: "The second objection is equally untenable. We concede that the administrator has power over only those assets within the State where letters are granted; and we might concede that in case of notes, bonds, etc., on debtors who live and have their property beyond the jurisdiction, the administrator has no jurisdiction or dominion. But this is not the case in respect to judgments. There can be no doubt if a debtor against whom the intestate in his lifetime obtained judgment, though at the time of the death of the intestate the debtor was beyond the jurisdiction, afterward came within the jurisdiction, the administrator might proceed to collect the money from him. The effect of a judgment as such, unlike a note, is confined to the State where rendered. It is therefore record evidence of a debt. It may be sued on, it is true, out of the State. But it is not easy to see how an administrator of the creditor in California could take to himself as assets a judgment remaining on record in New York merely from the fact that the debtor happened for the time being to reside in California. If the debtor went back to New York, or had property there, it is clear that the California administrator could not collect the money. If he collected anywhere it would not be by virtue of the judgment in New York vesting in him any title to it, but merely because the transcript of the judgment gave him evidence upon which he might sue. The judgment is a record, and for any use to be made of it, or any power to enforce it, by execution or other process, must belong to the administrator in New York, or this anomaly would result, that the administrator in California would own the judgment for the purpose of suing on it in California, and the administrator in New York would own it for the purpose of collecting it by issuing execution on it in New York. We think no such doctrine can be maintained."

According to the principles recognized by all the authorities, the judgment debt herein sued was a debt at law due to the plaintiff

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personally, and she was fully authorized to bring and prosecute this action.

We find nothing in the provisions of the Code of Civil Procedure that affects or modifies the general principles of law which control and determine the rights of the parties hereto. Section 1913 is merely declaratory of the rule of the common law that an executor or administrator, as such, has no power which he can employ extra-territorially. The third subdivision of section 1294 allows letters to issue in the county "in which any part of the estate may be." But when the plaintiff recovered the judgment in Texas, the simple contract debt ceased to exist. It was merged in the judgment. The judgment was in Texas, and the simple debt was not an asset in this State which an executor or administrator here appointed could sue to recover. The Texas judgment would constitute a perfect defense to an action brought here on the original demand.

As to the second of the objections to plaintiff's evidence as above enumerated, the court below was justified "in treating the action as an action in the name of M. F. Lewis as an individual, and in holding the description of plaintiff's official capacity to be mere surplusage."

When it is not necessary for a plaintiff to sue as executor or administrator, all averments in his complaint in relation to his official capacity may be rejected. *Owen v. Frink*, 24 Cal. 171. And in *Biddle v. Wilkins*, *supra*, the Supreme Court of the United States holds that if the plaintiff who has recovered a judgment as administrator in one jurisdiction, and who brings an action on the judgment in another, names himself as administrator in the last action, the averment may be disregarded.

Order reversed.

MORRISON, O. J., and THORNTON, SHARPSTEIN, ROSS, JJ., concurred.

LAWRENCE V. GREEN.

(70 Cal. 417.)

Carrier — passengers — presumption from accident — contributory negligence.

A public stage coach was overturned by the breaking of a wheel. The plaintiff, a passenger, leaped from the coach and was injured. *Held*, (1) that the accident, unexplained, fastened liability on the carrier;* (2) that the plaintiff was not negligent if he did what persons of ordinary prudence would have done in the same circumstances.†

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

Van Clief & Wehe, for appellants.

Hundley, Gale & Ford, for respondents.

McKINSTRY, J. The complaint, after stating other facts, avers: "That whilst she, said Mary A. Lawrence, was said passenger and was being carried on said coach down the Goodyear Bar hill, between said mountain house and Goodyear Bar, at a point on said road, * * * by and through the carelessness and negligence of the defendants (proprietors of the coach), said coach broke down and was overturned, by means whereof the said Mary A. Lawrence was greatly bruised and injured," etc.

It was alleged in the answer that "said stage-coach had reached a point on said road a short distance above said Goodyear's Bar, and while making a short and abrupt turn therein, said coach slid or lurched to the left, and the nigh or left hind wheel was dished or broken. * * * That defendants do not own or have the control or any management of said road."

The bill of exceptions shows that when the accident occurred the coach "was being driven down grade of a mountain road more than ordinarily steep, using the brake, and upon more than an ordinary curve therein to the left and toward the mountain, about four feet down said grade, wherein the track for the wheels on the left side of the road was about one foot lower than the track

* See *Sanderson v. Frasier* (8 Colo. 79), 54 Am. Rep. 544; note, 50 Am. Rep. 653.

† See note, 38 Am. Rep. 599.

for the wheels on the right side thereof; but the condition of this part of the road when the accident happened had not been changed in any respect during the period of six months next before the time of the accident in question here, and during all of which period of six months the defendants had driven their coaches over it daily, except one day in each week, and had actual notice of its condition during that period and at the time of the accident; and D. P. Cole, one of the defendants testified that for some time before the accident he had considered it a dangerous part of the road."

The bill of exceptions does not show the pace or rapidity with which the horses were being driven. The evidence and the admission in the answer that the immediate cause of the overturn was the breaking of the wheel established *prima facie* that the wheel was defective. *Christie v. Griggs*, 2 Camp. 79; *Dawson v. Manchester R. Co.*, 5 L. T. N. S. 682; *Shear. & Redf. Neg.*, § 268, note. There was no evidence that the breaking was caused by "heating," or that the defect in the wheel was latent, or that it had been examined without discovery of the defect.

The occurrence of an injury through a defect in the vehicle is at least *prima facie* evidence of negligence on the part of the carrier. *Shear. & Redf. Neg.*, § 268. The carrier must have carriages adequate to the work to which they are subjected, and must see that they are kept in due repair. *Whart. Neg.*, §§ 628, 629. But the carrier is not liable for damages incurred through latent defects which could not have been discovered by examination, and which are not traceable to any want of good business diligence in the manufacturer. *Whart. Neg.*, § 631.

The negligence of the defendants was established *prima facie* by proof that the wheel broke, and the coach was thus overturned, and there was no evidence to overcome the *prima facie* case — no evidence that the wheel was sound, or that the defect was latent. As the case was presented was the court authorized to charge the jury upon the hypothesis that the accident would have happened if there had been no defect in the wheel? The fact that the road was a foot lower on the inner side did not perhaps prove nor tend to prove that the wheel was a good wheel. It left the unsoundness of the wheel still uncontested, and simply showed that the unsound wheel broke when subjected to the strain or to the slide or lurch of the coach on the uneven ground. If the condition of the road was merely sufficient to create a suspicion that a sound wheel might have been

broken under the circumstances, the jury would not be justified in acting upon a mere surmise or conjecture of the existence of a possible fact of which there was no real evidence.

But even if it should be conceded that evidence that one side of the road was lower than the other, and that the coach lurched toward the lower side, tended to overcome the *prima facie* case of the plaintiff, it was for the defendants to overcome it.

The court charged the jury: "The defendants in this class of actions are not bound to prove just how the accident occurred; they must prove however by a preponderance of testimony, that it was not the result of their carelessness or ignorance."

The defendants were not bound to prove any thing in the first instance. But when the plaintiff had shown *prima facie* that the accident was caused by the defective wheel, the burden was cast on the defendants to show that the wheel was not defective, or that the defective wheel did not cause the overthrow of the coach. It was for them to prove that the wheel was not in fact defective, or that the defect was latent, or at least that the cause was something entirely independent of the wheel, and one for which they were not responsible. In *Boyce v. Cal. Stage Co.*, 25 Cal. 468, the court said: "The fact that the coach did overturn is all that he (plaintiff) need establish in order to recover for such injuries as he may have sustained. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty * * * for the law holds him responsible for the slightest negligence," etc. "In doing this the defendant must necessarily explain how the overturning occurred, and if he fails to do this the presumption of negligence remains." See also *Fairchild v. Cal. Stage Co.*, 13 Cal. 599.

Here not only did the plaintiff prove the overturning of the coach, but the immediate cause of the overturning is admitted. The defendants could not overcome the plaintiff's case and show that the accident was not the result of their carelessness or negligence, except by proving how the accident did occur, and that it did not occur by reason of a defect in the wheel, or that such defect was latent. But the court's charge was that defendants need not prove how it occurred, but assumed that as against the plaintiff's case, they could show their irresponsibility in some other way.

The court below instructed the jury: "If you believe from the evidence that the plaintiff rashly or imprudently, and of her own

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fault, leaped from the stage-coach and thereby caused or contributed toward the injury complained of, your verdict should be for the defendants." "When a party has been injured and such injury was caused or contributed to by his own rashness, imprudence or indiscretion, he is not entitled to recover damages for such injury. A coach proprietor is certainly not responsible for the rashness or imprudence of his passenger." "It is not sufficient to constitute contributory negligence that the plaintiff's own act contributed to her own injury, but it must also appear that she so contributed by her own fault, or by neglecting to take ordinary care of her own personal safety."

A passenger ought not to be deemed guilty of contributory negligence when he takes such risk as under the same circumstances a prudent man would take. *Shear. & Redf.*, § 282. And when the circumstances are such as would deprive a person of ordinary prudence of his self-possession, it is not to be expected that he will have all his mental faculties perfectly at his command. Speaking of the position of the plaintiff in *Robinson v. W. P. R. Co.*, 48 Cal. 421, the court said: "Startled and alarmed as she doubtless was by the imminent peril of her position, it would be asking more than should be required of an ordinarily prudent and reasonable person to demand that she should exercise the soundest discretion in her own efforts to escape."

If the case showed that the plaintiff encountered no danger from the overturning of the coach and that an ordinarily prudent person must have known that there was no danger, but that she gave way to fright for which there was no real or apparent cause, it may be that her act in leaping from the coach would be held to be contributory negligence. The law however must select a standard by which to estimate the conduct of one in apparent danger, and selects as a standard the probable conduct of a person of ordinary prudence under the same circumstances. Applied to the facts of this case the hypothesis concedes that the plaintiff was in some peril and in such degree of peril that she may have acted in a manner, which in the light of "the wisdom which comes after the fact," was not the wisest." The jury, unenviored by the threatening circumstances which surrounded the plaintiff, may have believed that if she had remained in her place she would not have been seriously injured or injured at all.

Would a person of ordinary prudence and courage have jumped from the coach? It may be claimed that this question was implied

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in the instructions given; that she was not guilty of a fault if she acted as a person of ordinary courage and prudence would have acted. The jury were told broadly that a coach proprietor is never responsible for the imprudence of his passengers. And they were also told in effect that if plaintiff was indiscreet, if she was not prudent, sagacious in adapting means to the end — her personal safety — if she was not circumspect and wisely cautious, she could not recover. The real question was, whether assuming her to be ordinarily reasonable and prudent, the circumstances were so alarming as to deprive her in a degree of her ordinary reason and prudence and to induce her instinctively to seek safety by an act which although not such as the jury might believe to be prudent or discreet, was such as the generality of persons would have adopted in the dilemma in which she was placed.

Judgment reversed and cause remanded.

ROSS and MYRICK, JJ., concurred.

Hearing in bank denied.

EX PARTE SHOBERT.

(70 Cal. 638.)

Criminal law — lottery — foreign bonds.

Bonds were issued by the city of Brussels, of which a certain number were payable with interest each year, and those payable in any year were to be determined by an annual drawing of the numbers by lot. The holders of the bonds bearing the first forty numbers so drawn were to be paid premiums ranging from 25,000 francs for the first to 200 francs for the last. *Held*, that this did not constitute a lottery.

HABEAS corpus. The opinion states the case.

Charles B. Darwin, for petitioner.

Lloyd & Wood, for respondent.

BELCHER, C. The petitioner was accused of selling a lottery ticket in the city of San Francisco, and was tried and convicted. The complaint against him contained a copy of the supposed lottery ticket; and it appears therefrom to have been one of seventy thousand bonds or obligations, for 100 francs each, which were

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issued by the city of Brussels in 1853. The bond in question is numbered 387, and provides that the holder shall be entitled to the repayment of his capital, and interest thereon at the rate of three per cent, payable annually. It further provides, in effect, that two hundred of the bonds or obligations shall become due and payable at the end of the first year, two hundred and six at the end of the second year, and two hundred and twelve at the end of the third year, etc., all of them payable in sixty-six years.

To ascertain what particular bonds are payable in any one year, a drawing is to be had on the thirty-first day of December of each year, or if that day be a Sunday or holiday, on the evening before, and the bonds bearing the numbers drawn are then to be paid on the thirty-first day of March following. It is further provided that the holders of the bonds bearing the first forty numbers drawn shall be paid premiums, ranging from 25,000 francs for the first down to 200 francs for the last.

Is the instrument above described a "ticket, chance, share, or interest in or depending upon the event of any lottery," the sale of which in this State is prohibited by sections 319 and 321 of the Penal Code?

In *Kohn v. Koehler*, 96 N. Y. 362; s. c., 48 Am. Rep. 628, a similar question was before the Court of Appeals of New York. In that case, the bond in question was one of certain bonds issued by authority of the government of Austria, and by which that government obligated itself to pay the principal of the bonds with interest and a premium named, and also any additional sum which the holder might become entitled to in case the number of his bond drew a prize in a drawing to be had as specified.

The court said: "The evident object and purpose of the government in issuing the bonds was to obtain money for its own use and benefit. According to the true interpretation of the instrument, the government, upon receiving the money, promises to pay the principal, interest and premium named, and in addition any sum which may be drawn by the holder of the bond, in accordance with the rules and regulations indorsed thereon. This additional sum depends upon a contingency, which is to be decided by lot or chance. Independent of this, the amount and the terms are fixed by conditions of the bond. The substance of the transaction relates to a loan of money to the government, and the provision made for its payment. This is the main object and purpose for which authority was given to issue the bonds, and they were disposed of evidently having this in view. The pro-

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vision by which upon a certain contingency the holder of the bond might receive an additional sum was no doubt an inducement held out for the purpose of obtaining money on the same, but it did not constitute the main feature and the substance of the transaction between the government and the purchaser of the bond. It was a mere appendage and an incident to its main purpose, by means of which the holder might by chance receive a larger sum than the principal and interest which the bond itself provided for.

“In loaning money upon these bonds, the holder thereof ran no risk of loss, if the principal and interest were paid, and he took the chances which might arise in case it should be determined by lot that his bond was entitled to a larger sum than the principal, interest and premium, which he was sure to get in any event. While this latter privilege depended upon chance, it cannot, we think, be held upon any sound theory that it converted the bonds into lottery tickets, and imparted to the loan which was made thereon the character, object and accompaniments of a mere lottery scheme.

“A government bond of the character of the one involved in this action does not come within the mischief intended to be remedied, or within the scope and purpose of the enactments against lotteries. Such an instrument is not named nor is it within the purview of the statute or the intention of the law-makers. These bonds have been issued by several of the governments of other countries, and in no sense can they be regarded as being within the inhibition of the statutes of this State, which were intended to suppress lotteries and to prevent citizens from indulging in this species of gambling.

“The bond in question was an evidence of debt, and a public security of a foreign government, exposed for sale the same as other securities upon which money is loaned, and its sale did not violate the provisions of the statute already cited. It was not raffled for or distributed by lot or chance, and it cannot be said that the purchase of the same by the plaintiff was within the provisions of section 22 of 1 Revised Statutes, 665.”

It is apparent that the reasoning in that case exactly covers this case, and the conclusions reached we think are correct.

It follows that the petitioner should be discharged from custody. FOOTE, and SEARLS, CC., concurred.

The COURT.—For the reasons given in the foregoing opinion, it is ordered the petitioner be discharged.

MYRICK, J., dissented.

CASES
IN THE
SUPREME COURT
OF
IOWA.

HODGIN V. TOOLB.

(70 Iowa, 21.)

Executor and administrator — administrator with will annexed — power to sell land.

An administrator with the will annexed has no implied authority to execute a power given by the will to the executor to sell land.

ACTION to set aside a deed. The opinion states the case. The defendant had judgment below.

J. M. St. John and G. B. Haddock, for appellant.

H. H. Artz and Lyman Evans, for appellees.

SEEVERS, J. [Omitting minor points.] The facts are that the plaintiff is the widow of Robert Hodgin, who died in August, 1880, in the State of Ohio, where he and the plaintiff at that time resided. Robert Hodgin, at the time of his death, owned real and personal property in the State of Ohio, and also certain real estate which is the subject of controversy in this action. The deceased executed a will, which was duly admitted to probate in the State of Ohio, and he thereby devised to the plaintiff, after the payment of his debts, all his "property of every description, real, personal and mixed," for and during her natural life. Provision was made in the will for repairing and adorning a lot in a cemetery, and for a family

monument. Money was set aside for these purposes. Item four of the will provides: "After the above bequests are fully carried out, I give and bequeath the balance and residue of the estate to certain persons," and item five is in these words: "I do hereby nominate and appoint Ben H. Steel and George Starbuck, or the survivor of them, executors of this, my last will and testament, hereby empowering them, or the survivor of them, to sell at public or private sale all my real estate, of every description, upon such terms of credit or otherwise as they may think proper, and deeds to purchasers to execute, acknowledge and deliver in fee-simple." Starbuck failed to qualify as executor, but Steel did, and thereafter resigned the trust, and thereupon Samuel Berry was, by the proper Probate Court of Ohio, appointed "administrator of the estate of said Robert Hodgin with the will annexed," and he duly qualified as such. In November, 1881, Berry caused said will to be admitted to probate in Taylor county, Iowa, and on the 8th day of December, 1881, said Berry, as such administrator, conveyed the real estate (in said county belonging to the deceased) to Johnson, Franklin & Co. for a sufficient consideration, and the referee found that there was no fraudulent intent upon the part of any one connected with such purchase and sale. It is insisted that under the provisions of the will, Berry had the power and authority to make the sale and conveyance he did, and this is the question to be determined.

Counsel for the appellant insist that trust and confidence were reposed in the persons named as executors by the testator, and that the administrator was not invested therewith, and that he did not, by devolution, have the power to sell the real estate, unless it became necessary to do so to pay debts or legacies, and that in such case the sale could only be made in pursuance of authority granted by the proper court of this State. It is apparently conceded that the executors could sell at any time during the existence of the life-estate and convey a fee-simple title. It may be doubtful whether, under a proper construction of the will, this is true; but as the point is not made by counsel, we shall not stop to discuss it. That personal trust and confidence were reposed by the testator in the persons named by him as executors we have no doubt. Such trust was not reposed in them as executors, but as individuals, for they, or the survivor of them, were empowered to sell. A large discretion was given them, for the will does not direct that

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a sale should be made. This was to be determined by the persons named as executors. It was left to their discretion to determine when, for what reason, and the terms and conditions upon which it should be made. There is no pretense that the sale and conveyance of the land were made for any purpose connected with the due administration of the estate. The only authority is that given by the will. If under the power therein conferred the administrator could not lawfully make the sale and conveyance, then it is invalid. In this State an administrator has no control of the real estate, unless it become necessary to sell the same for the payment of debts, and then he must obtain authority to make the sale from the proper court.

In Williams on Executors (vol. 1), in a note on page 724, it is said: "As a general rule, a power to sell land given by a will to an executor will not devolve upon an administrator with the will annexed." In support of this rule many authorities are cited, the majority of which we have examined, and we have no hesitation in affirming that the rule as stated above is sustained by the great and decided weight of authority, in the absence of a statute whereby such rule is changed. In fact subject to this qualification, we have been unable to find any adjudged case holding otherwise. The leading cases in this country are *Conklin v. Egerton's Adm'r*, 21 Wend. 430, and *Tainter v. Clark*, 13 Metc. 220. In both of these cases and particularly in the first, the whole subject is exhaustively discussed, and the conclusion reached above stated. The following cases sustain such rule: *Ross v. Barclay*, 18 Penn. St. 179; *Brown v. Hobson*, 3 A. K. Marsh. 380; s. c., 13 Am. Dec. 187; *Lucas v. Price*, 4 Ala. 697; *Vardeman v. Ross*, 36 Tex. 111; *Hall v. Irwin*, 2 Gilman, 176; *Nicoll v. Scott*, 99 Ill. 259; *Wills v. Cowper*, 2 Ohio, 124. In *Ingle v. Jones*, 9 Wall. 486, it is said: "Such a power never passes by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power in place of the executor appointed by the will. In view of these authorities we do not deem it necessary to restate the reasons upon which the rule is founded, deeming it sufficient to say that the rule and reasons upon which it is based seem to us to be correct on principle, and therefore we are content to follow the authorities cited.

III. Counsel for the appellees however insist, that under the statute and decisions of this court, a different rule must prevail,

and they cite, as sustaining their position, *Shawhan v. Loffer*, 24 Iowa, 230, and *Lees v. Wetmore*, 58 Iowa, 170. In the first case no such question was before the court, and whatever is said in the opinion, which counsel seems to believe bears on the question under consideration, is used by way of argument. The last case is distinguishable upon two grounds. The first is that the will directed the real estate to be sold, and authority to sell was conferred by the will upon the executors as such. The second ground is that the executor or administrator appointed in this State applied for and obtained authority from the proper Probate Court to make the sale in accordance with and for the purpose of carrying out the provisions of the will. The statutes relied upon are the following sections of the Code:

"Sec. 2347. If a person appointed executor refuses to accept the trust, or neglects to appear within ten days after his appointment, and give bond as hereinafter prescribed, or if an executor remove his residence from the State, a vacancy will be deemed to have occurred.

"Sec. 2348. In case of vacancy, letters of administration with the will annexed may be granted to some other person, or if there be another person competent to act, he may be allowed to proceed by himself in administering the estate.

"Sec. 2349. The substitution of other executors shall occasion no delay in administering the estate. * * *

It is evident, we think, that these sections simply refer to and have a bearing on matters which ordinarily occur in the administration of all estates. No power whatever is conferred upon the substituted executor or administrator. Thereunder he obtains simply the power of every other administrator who is appointed in the first instance. It cannot be said, we think, that the foregoing sections of the Code devolve on the substituted administrator a personal trust which the testator delegated to the person named by him as executor. When *Conklin v. Edgerton's Adm'r*, before cited, was decided, there was in force the following statute: "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators with such will annexed shall have the rights and powers, and be subject to the same duties, as if they had been named in such will." And it was held that this statute had reference only to the personal estate, inventories, distribution and reme-

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dies. This conclusion was questioned by some of the members of the Court of Errors, but it has never been overruled. *Roome v. Philips*, 27 N. Y. 357 (363); *Egerton's Adm'r v. Conklin*, 25 Wend. 224; and *Brown v. Armistead*, 6 Rand. 594; *Shields v. Smith*, 8 Bush, 601, and *Dilworth v. Rice*, 48 Mo. 124, are based on statutes materially different.

Counsel also rely on and cite section 2351 of the Code. This section relates to the probate of foreign wills, and the powers of executors thereunder, but no power is thereby conferred upon an administrator with the will annexed.

We are of the opinion the court erred in refusing the relief asked by the plaintiff. The judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with this opinion; or the plaintiff may have a decree, if she so desires, in this court.

Judgment reversed.

MOORE V. CHURCH.

(70 Iowa, 208.)

Conflict of laws — assignment for creditors — estoppel.

The validity of an assignment of lands for the benefit of creditors must be determined by the law of the State where the lands are situated.*

Where parties to an assignment for creditors all live in New York, and the assignment is valid there but invalid in Iowa, the New York creditors are not estopped from denying its invalidity in Iowa.

ACTION to set aside an assignment. The opinion states the case. The plaintiff had judgment below.

J. J. Smith, for appellant.

Nourse, Kauffman & Guernsey, for appellee.

BECK, J. I. The allegations of the petition, briefly stated, are as follows: Plaintiff recovered a valid judgment for a large amount, in the State of New York, against defendant Church, which remains unpaid. Action, aided by attachment, was brought on this judgment in the District Court of Wapello county, and judgment therein was rendered for the amount due on the New York

*See *Butler v. Wendell* (57 Mich. 62), 58 Am. Rep. 829.

judgment. Certain real estate in Iowa owned by Church was levied upon under the attachment issued in the case. Prior to the rendition of the judgment in New York, Church executed to defendant Smith a deed of assignment for the benefit of his creditors. As a part of the transaction of the assignment, and to effectuate the purposes thereof, Church executed to Smith a deed conveying the property in question in fee-simple. By the terms of the assignment certain creditors are preferred, priority in the payment of the debts due to them being directed. Plaintiff alleges that by reason of this preference, which is forbidden by the statutes of this State, the assignment is void. They pray that the two deeds, together operating as an assignment with preferences, be declared void, and that the lands attached be made subject to plaintiff's judgment rendered in the Wapello District Court.

The defendant Smith, in his answer, admits the execution of the deed of assignment, and the other deed to him, on the same day, and that preferences were given to certain creditors of Church by the terms of the assignment, substantially as charged in plaintiff's petition. He avers that plaintiff and defendants are all residents of the State of New York; that plaintiff had actual notice of the execution of the two conveyances, and that the deed to him in fee-simple was duly filed in the office of the recorder of deeds of Wapello county. He alleges that the laws of the State of New York, under which the assignment is valid, are applicable thereto, and that the rights of the parties must be determined by the laws of that State. He further alleges that plaintiff became his security upon a bond given under the law of the State of New York for the faithful performances of his duties as assignee, and that plaintiff presented his claim to defendant, based upon the indebtedness which is the foundation of the judgment he now seeks to enforce, for allowance, and objected to the allowance of the claim of one of the preferred creditors, and requested and obtained permission to contest it, and a time was fixed therefor, but upon the final hearing of his objections, he failed to appear, and the preferred claims were allowed. Defendant further alleges that he has sold portions of the property transferred to him by the assignment, but it is not shown that the property attached by plaintiff was so conveyed. Upon these grounds defendant alleges that plaintiff is estopped to dispute the validity of the deeds of assignment, and to set up any claim in this action against the rights of defendant. The claim

filed by plaintiff with the defendant as assignee, referred to above, was based upon the judgment which is the foundation of the judgment in the District Court of Wapello county sought to be enforced in this action, and upon other indebtedness specified in the claim. But the plaintiff explicitly sets out in the claim that the action in the Wapello District Court had been commenced thereon, and the lands in question had been seized upon an attachment issued in that action, and shows that judgment therein had not been entered when the claim was filed. He declares in the claim that it will be credited for the amount realized from the lands attached in that suit. He makes other statements touching securities, and proceedings to secure the other items of indebtedness upon which the claim is based.

The plaintiff demurred to the answer of defendant, on the grounds (1) that the assignment, as shown by the petition, is void under the laws of Iowa, which are applicable thereto, and control the rights of the parties, for the reason that it gives preference to creditors; (2) the answer sets up no facts which raise an estoppel affecting plaintiff's right to subject the property attached to his judgment.

II. In our opinion the District Court rightly sustained plaintiff's demurrer to defendant's answer. This court held, twenty-eight years ago, that the validity of an assignment of real property situated in this State, for the benefit of the creditors of the assignor, made in another State, must be determined by the laws of this State, and if such assignment gives preference to creditors it is void as to real property within this State conveyed by the assignment. *Loving v. Pairo*, 10 Iowa, 282; s. c., 77 Am. Dec. 108. This decision is based upon the familiar rule of the law that the validity of conveyances of real estate must be determined by the *lex loci rei sitæ*. The fact that plaintiff and defendants were all residents of New York does not modify the rule, and require the application of the law of that State to the transaction. It has been held that it would not have this effect in a case wherein the right to the personal property was involved. The same or stronger reasons require the application of the rule to cases involving the title of real estate. *Green v. Van Buskirk*, 7 Wall. 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Warner v. Jaffray*, 96 N. Y. 248; s. c., 48 Am. Rep. 616; *Osborn v. Adams*, 18 Pick. 245. The deed of assignment and the deed in fee, executed by Church to Smith on the same day, and conveying the real

estate levied upon under the attachment, are to be considered together as an assignment for the benefit of creditors. *Cole v. Dealham*, 13 Iowa, 551; *Burrows v. Lehndorff*, 8 Iowa, 96; *Osborn v. Adams*, *supra*.

III. Code, § 2115, provides that "no general assignment of property of an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." The assignment in this case covered all the property of Church. It was therefore general, and under this statute, is void.

IV. We think the facts set up in the answer to show an estoppel fail to have that effect. The assignment was valid under the laws of New York, and transferred to Smith all property found in that State. The plaintiff was bound to recognize its validity to that extent. He was entitled to all the benefits bestowed upon him by the assignment. The facts that he had notice of the assignment, and became the surety of the assignor, or even assented to the assignment, cannot be regarded as showing his recognition of and assent to the assignment, so far as it covered property not in the State of New York. To that extent he was bound to recognize its validity, and these acts extended no further. In the claims he filed with the assignee he expressly reserves his rights secured under the laws of Iowa, and claims only the balance which should be due on his claim after exhausting the Iowa lands. This the law of New York would doubtless secure to him. Unquestionably he would be entitled to a distributive share of whatever money should remain after payment of the preferred creditors, even though his claim may have been diminished by avails realized in his proceedings to subject the Iowa lands. There is nothing to show that he waived his rights to enforce his claim against these lands, or that he admitted that the assignment covered them. On the contrary, he shows that he relied upon his action against Church to subject these lands to the payment of his claim. We discover nothing in the case which raises an estoppel against him. He did not act, and made no declaration, which could have induced action upon the part of the defendant to abandon his claim to the validity of the assignment, or in any manner to change his position or condition. In fact, nothing of the kind is shown or claimed.

These views dispose of all questions in the case. The judgment of the District Court is affirmed.

Judgment affirmed.

State v. Finch.

STATE V. FINCH.

(70 Iowa, 318.)

Evidence — opinion — of value.

Any person of ordinary intelligence is competent to testify to the value of a seal-skin coat, although he may never have seen one bought or sold.*

CONVICTION of larceny. The opinion states the case.

A. J. Baker, attorney-general, for State.

ADAMS, C. J. It was insisted below that there was no legal proof of the value of the overcoat. The only witness who testified to the value of the overcoat was one Arnold. He showed that he had never seen a seal-skin overcoat bought or sold, and did not show that he had any knowledge of the value of such an article, except such as any man of ordinary intelligence might be presumed to have. We do not think however that we should be justified in wholly discarding his testimony. He might not be a very accurate judge of the value of such an article, but we think, that having seen and examined the coat, he might form some opinion about it. He doubtless could judge with considerable accuracy of the value of such overcoats as are in common use, and he could judge, we think, though perhaps not as accurately, how this compared in value with the best of such coats. We think that his testimony was not inadmissible, and if not, the verdict was not without support.

[Minor points omitted.]

Judgment affirmed.

* To same effect, *Prints v. People* (42 Mich. 144), 36 Am. Rep. 487.

Eddy v. Hawkeye Insurance Company.

EDDY V. HAWKEYE INSURANCE COMPANY.

(70 Iowa, 472.)

Insurance — vacancy.

A tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and with his servants began cleaning it, and they were continuously engaged during the working hours of each day in cleaning and moving goods into the house until Friday evening, intending that the family should be fully domiciled there on Saturday, but on Friday night the house was burned. *Held*, that the house was not vacant.*

ACTION on a fire-insurance policy. The head-note states the case. The plaintiff had judgment below.

E. J. Ingersoll, for appellant.

E. E. Hasner and *H. W. Holman*, for appellee.

ROTHROCK, J. [Omitting other points.] It will be observed, from the conditions in the policy above quoted, that the defendant was not liable for any loss or damage while the insured property should be vacant or unoccupied. The evidence shows that the house had been temporarily occupied by a tenant, who removed therefrom on Tuesday. The fire occurred on the following Friday night. The plaintiff was residing in another house on another part of the farm, and on the next morning after the tenant moved out of the house which was burned, the plaintiff took possession of it, and his employees cleaned the house, and prepared to move in. They were constantly engaged every day in cleaning the house, and in moving in household goods, until Friday evening. By that time there were carpets and bedding and bedsteads, cans of fruit, chairs, pictures, mirrors and a stove, and clothing, a table and dishes in the house, and the family were expecting to be there, to remain, on Saturday. The farm stock was there, and the plaintiff, or his employees, were in and about the house every day, from six o'clock in the morning until seven or eight o'clock in the evening. The preparation for occupying the house was continuous during all the working hours of each day.

* See note, 35 Am. Rep. 448.

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The court instructed the jury upon this feature of the case as follows: "(11) If you are satisfied by a preponderance of credible testimony, that immediately upon the removal of the tenant the plaintiff took possession of the house in controversy, by himself and his employees, for the purpose of making that his home, and commenced cleaning the house, and moving his furniture therein, and so continued to work in cleaning and moving into said house without any cessation or abandonment of his purpose of making that his home; and had therein at the time of the fire certain of his furniture and household goods, so put there for use in his family; and that nothing was wanting to complete personal occupancy, except that he lodged and took his meals at another house, near by; and that he intended to personally occupy the house the next day with his family, had the house not been destroyed, then the premises were not vacant and unoccupied, within the meaning of the policy."

This instruction is in full accord with the facts as disclosed in evidence, and we believe it states a correct proposition of law. The provision that a policy upon a dwelling-house shall be void if the building should become vacant or unoccupied, or that the policy shall cease to be operative during such period, is not peculiar to the policy in suit. It is usually found in insurance contracts, and there are a number of adjudged cases defining the meaning of the term, "a vacant or unoccupied house," as used by parties to these contracts. There is no case to which our attention has been called which holds that a house is vacant or unoccupied by the mere fact of the physical absence of the occupants for a day or night. As was said in *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457: "Of course, the contract must receive a reasonable construction. The parties did not intend that one tenant should not move out and another move in, nor did they intend that the house should be deemed vacant if the occupant should close it, and go off on a visit, and not occupy it for a reasonable time." If such a rule should obtain, insurances of dwelling-houses would be of little value to the insured. In the case of *Shackelton v. Sun Fire Office*, 55 Mich. 288, the house was occupied by a tenant, who vacated it on June 19, 1883. The owner took possession, put her furniture in the building, but for what seemed to be good reasons, she did not take her meals nor lodge in the house, and the same was destroyed by fire on the fourth day of July. The period in

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which the house was not occupied was much longer than in the case at bar. It was held that the house was not vacant or unoccupied, within the meaning of the contract. The case, in its facts, is much like this case. The court said: "The insured had taken possession of the house, as the jury must have found, for the purpose of permanent occupancy. She had moved in her household furniture and other goods, and was cleaning and doing other work preliminary to living there in person. Nothing apparently was wanting to complete personal possession, except that she lodged and took her meals at her father's, a few rods off. These facts are not conclusive against her occupancy." See also *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; s. c., 23 Am. Rep. 111; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; s. c., 37 Am. Rep. 488; and *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; s. c., 34 Am. Rep. 106. There is no other question in this case which demands our attention, and we are united in the conclusion that the judgment of the court below should be affirmed.

Judgment affirmed.

IOWA SEED COMPANY v. DORR.

(70 Iowa, 481.)

Partnership—incapacity—right to use firm name.

C. W. D. & Co., a copartnership which had acquired an extensive trade and reputation as dealers in seeds, made an assignment for the benefit of creditors, and the assignee sold the stock to the plaintiff company, which continued the business at the old stand, renting the building from the owner. Among the stock so purchased was a large number of wrappers, sacks, etc., marked with the name of C. W. D. & Co. One of the firm of C. W. D. & Co. was also a member of the plaintiff company. Afterward C. W. D. organized a corporation under the name of C. W. D. & Co., and engaged in the same business in the same city. The plaintiff claimed, but never exercised, the right to use the name of C. W. D. & Co. *Held*, that the plaintiff was not entitled to an injunction restraining the defendant from using that name and receiving mail matter thus directed.

INJUNCTION issued below. The head-note states the facts.

Geo. E. McCaughan, for appellants.

Cummins & Wright, for appellees.

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SEEVERS, J. I. Counsel practically agree that the good-will of a partnership in a settlement of the account between a retiring partner and one who continues the business may constitute a valuable asset, which must be accounted for. The authorities, without exception, so hold. But there is a contention between counsel as to whether the good-will of the firm of C. W. Dorr & Co. passed by the assignment to the assignees, and by the sale to the plaintiff, and if he does, it is contended by the appellant that the plaintiff did not obtain for all time the right to the exclusive use of the name of C. W. Dorr & Co., as against C. W. Dorr. It is conceded by counsel for the appellee that the plaintiff did not, by its purchase, obtain any exclusive right to the business in which it is engaged. It is also conceded that C. W. Dorr had a perfect right to engage in such business, but it is insisted that he cannot use the name of C. W. Dorr & Co.

Giving to the petition a fair, and in fact a liberal construction in favor of the plaintiff, it cannot, we think, be said that "C. W. Dorr & Co." constituted a trade-mark which the plaintiff purchased. The most that can be said is that the firm of C. W. Dorr & Co. had an extensive business reputation, and accumulated a large stock of goods, and this stock of goods and the good-will of the business, it will be conceded, the plaintiff purchased. But the firm had no trade-mark, nor is it stated that the house or place of business was advertised and known by any distinctive name; and if the petition can be so construed, it appears from the record that such place of business was not obtained by the purchase from the assignee. This fact distinguishes this case from *Hudson v. Osborne*, 39 Law J. Ch. (N. S.) 79. In the cited case the bankrupt had a place of business designated and known as "Osborne House," of which the plaintiff became the owner, in pursuance of proceedings in bankruptcy against the defendant, whose name was Osborne, and he was enjoined from designating his place of business after his discharge as "Osborne House." In *Croft v. Day*, 7 Beav. 84, it is said that each case of this character must depend upon its peculiar circumstances of which there may be a great variety. The clearly distinguishing feature of this case from the most of the authorities to which our attention has been directed, is that the plaintiff has not adopted, conceding it had the right to do so, the name of "C. W. Dorr & Co." At most, it only claims to be the successor of C. W. Dorr & Co., and the right to use the labels, bags, etc., which it purchased.

It may be that its claim in this respect is well founded, but it does not necessarily follow that it can prevent the defendant from using that name when the plaintiff has not at any time transacted business in such name. It certainly, by its purchase, did not acquire any right to the name of "C. W. Dorr," nor did it acquire his business knowledge and experience.

C. W. Dorr clearly has the right to go into business in his own name, and we cannot see why he cannot do so under the name of C. W. Dorr & Co., unless in so doing he misleads the public or encroaches on the rights of the plaintiff. The mere fact that the latter claims to be the successor of a firm of the same name should not, it seems to us, deprive the plaintiff of such right. There is another circumstance entitled to weight. Seeds and plants are grown and ordinarily produced from year to year. Peculiar skill in cultivation may increase the quantity of the former and the thriftiness of the latter. Whether the seeds so produced will grow is not so absolutely certain. We can readily see that it may require peculiar knowledge and experience to tell whether the seeds will germinate or not. Now if Dorr possesses such knowledge, or if the public so believe, the plaintiff has no right thereto, and therefore it has no right to restrain Dorr from availing himself thereof, if it be to his interest or advantage to do so. We have examined all the authorities cited by counsel, and in our opinion the facts in all of them are so materially different that they are not applicable, except so far as general principles applicable to this class of cases are announced. They simply indicate the path which may be followed to advantage. Reference however is made to *Burgess v. Burgess*, 17 Jur. 292; *Glen & Hall Manuf'g Co. v. Hall*, 61 N. Y. 226; s. c., 19 Am. Rep. 278.

LUCAS v. WHITE LINE TRANSFER COMPANY.

(70 Iowa, 541.)

Corporation — contract ultra vires — estoppel.

A corporation organized for a "general freight and transfer business" has no power to become surety nor to assume the principal's debt, and is not estopped by such assumption, made by its officers without the authority of the directors or stockholders.*

ACTION by co-surety for contribution. The opinion states the case. The plaintiff had judgment below.

Cummins & Wright, for appellant.

Goode & Phillips, for appellee.

ROTHROCK, J. I. The petition shows that the Valley National Bank and White Line Transfer Company are corporations organized under the laws of Iowa; that for the purpose of securing to the Philip Best Brewing Company payment for such beer as Leach & McCullum should purchase of said brewing company, said bank by its cashier and said transfer company by its secretary, J. O. Perrin, became sureties for said Leach & McCullum in a bond for \$1,500 made to said brewing company as obligees; that subsequently the said Leach & McCullum failed in business, and refused to pay their indebtedness to the brewing company, and on May 27, 1884, executed their note to the said bank and transfer company, payable on demand, and in consideration of the payees therein assuming to pay \$1,500 to said brewing company; that on May 28, 1884, the following letter was directed to and accepted by the brewing company:

"*Philip Best Brewing Company, Milwaukee, Wis.*:"

"DEAR SIR — By an arrangement with Leach & McCullum, and in view of the fact that we were sureties to you for them, we have assumed \$1,500 (the measure of our obligations as sureties) of their indebtedness to you.

"Very respectfully, etc.,

"W. D. LUCAS, Cashier,

"*White Line Transfer Co.*

"P. J. MILLS, President."

*See *Day v. Spiral Springs Buggy Co.* (57 Mich. 146), 58 Am. Rep. 353.

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That on the 30th day of September, 1884, the brewing company made demand for the sum of \$1,500, and interest, and plaintiff, after requesting the transfer company to pay its half thereof, and its refusing to do so, paid to said brewing company, "on said suretyship," the sum of \$1,572.51; that on the 28th of May, 1884, suit in attachment was brought in the name of plaintiff and defendant, and against Leach & McCullum, on the said note, dated May 27, 1884, and judgment recovered thereon; that the amount paid to the brewing company exceeds the amount realized from the attachment proceedings by the sum of \$1,267.79; that the interest thereon is \$35.56, making a total of \$1,303.35; that general execution was issued in the judgment against Leach & McCullum, and returned *nulla bona*. Wherefore the plaintiff claims that the transfer company, as co-surety in said bond, should contribute one-half the last-named sum, being \$651.67, and asks judgment therefor.

The plaintiff attached to the petition a copy of the bond to the brewing company, signed by the firm and individual names of Leach & McCullum, and also signed: "W. D. Lucas, Cashier, White Line Transfer Co. J. O. Perrin, Secretary." There are also attached copies of attachment, and indemnifying bonds given in the attachment proceedings, signed by Lucas, cashier, and the transfer company, as above, and also copies of pleadings and stipulations in said attachment proceedings, signed by attorneys purporting to act for both the bank and the transfer company, who were joined as plaintiffs in said attachment proceedings.

The White Line Transfer Company, defendant, filed an answer, stating, in substance, that the sole object of its organization was to engage in the "general freight and transfer business;" that it had no power or authority to become surety for the debt of another; that the secretary of said company, in signing the name of the defendant to the bond given to the brewing company, and the president of the company, in signing the name of defendant to the letter of May 28, 1884, did so without authority from the directors or stockholders of the defendant, and without the knowledge, on the part of many of them, that such signatures had been or were to be made; that the note executed by Leach and McCullum, dated May 27, 1884, payable to plaintiff and defendant, was so taken by plaintiff without any knowledge on the part of defendant's officers or stockholders until some time after said note was in the possession of the plaintiff, and that the attachment suit and proceedings

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based on said note were commenced and carried on without the knowledge of a large number of defendant's stockholders, who had a large share of the stock. The answer further states that the company never received, directly or indirectly, any thing for signing said bond or letter, or on account of said attachment proceedings; that neither itself nor its officers had any authority to sign the contracts, or do the acts alleged in plaintiff's petition; and that said contracts were and are *ultra vires*. To the answer was attached a copy of defendant's articles of incorporation, in which appears the following article: "(3) *Object*. Said corporation shall have power to engage in the general freight and transfer business and such other business as may not be inconsistent therewith."

To this answer the plaintiff filed a demurrer, on the grounds that by reason of the matters set out in the petition, and exhibits thereto, and by reason of the taking of said note in favor of plaintiff and defendant, and the proceedings therein, as set forth, defendant was estopped from setting up the plea of *ultra vires*, and that the fact that some of the stockholders did not know of the proceedings would not relieve the defendant from liability.

P. J. Mills and J. O. Perrin being made parties defendant, each demurred to the petition on the ground that on the face of the petition itself it appeared that they had not signed any of the obligations as individuals, and that the petition itself made no personal claim against them.

The court below sustained the demurrer to the answer, and rendered judgment in favor of plaintiff, on default for want of answer, for the sum of \$628.02, and interest. From this ruling and judgment the defendant appeals. The court also sustained the demurrers of J. O. Perrin and P. J. Mills, and from this ruling the plaintiff appeals.

As to the last ruling, we think the Circuit Court should be sustained, as the petition does not state, nor attempt to state, a cause of action against Perrin and Mills as individuals.

II. The principal question involved in the appeal is the ruling on the demurrer interposed by plaintiff against defendant's answer. It is true, the demurrer seems to be based on the idea solely, that by the conduct of the defendant subsequent to signing the original bond, it has estopped itself from setting up the plea of want of power or authority to sign the bond. The two following propositions are proper to be considered: 1. Had the officers of the defendant power

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to bind the corporation by placing its name on the bond in question? 2. If they had no such power, has the corporation, or its officers, so acted in relation thereto subsequently as to prevent or estop the corporation from now setting up the plea of want of power?

The corporation defendant is acting under the general incorporation laws of the State, and from the provisions of its articles and the statute it derives its power. A corporation exists and exercises its franchise only by virtue of a grant from the legislative power. The granting and acceptance of a charter in the case of private corporations for pecuniary profit are based on the theory that the prosecution of the business proposed will be a benefit to the public, and that the investment of capital therein will result in pecuniary profit to the stockholders, and that it is an undertaking, on the part of the corporation and all of its stockholders, that in consideration of the grant of power, the capital shall be used for the prosecution of the purpose named in the charter, and no other. There is also an undertaking on the part of the corporation with each stockholder that the capital he invests shall be put to no other use, and subject to no other hazard, than that contemplated by the powers expressed in the charter, and that those things which are within the scope or object of the corporation shall be done in the manner pointed out in the charter and the laws governing its action. But corporations and their officers do not always keep within their powers, and the application of the doctrine of *ultra vires* is often attended with very perplexing questions. By the application of a few plain rules however we may readily reach the proper answer to the question involved in the case.

1. Every person dealing with a corporation is charged with knowledge of its powers as set out in its recorded articles of incorporation.

2. Where a corporation exercises powers not given by its charter, it violates the law of its organization, and may be proceeded against by the State, through its attorney-general, as provided by the statute, and the unanimous consent of all the stockholders cannot make illegal acts valid. The State has the right to interfere in such case.

3. Where a third party makes with the officers of a corporation an illegal contract beyond the powers of the corporation, as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders no amount of ratification by those authorized to make the contract will make it valid.

4. Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which upon the proof of extrinsic facts (of which such parties had notice), lie beyond their powers, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damage to such third parties; for in such cases the third party is innocent, and the corporation or stockholders less innocent for having selected officers not worthy of the trust reposed in them.

5. This class of cases may be illustrated by that where the officer of a corporation, empowered to build and operate a certain line of railroad, purchase iron to be used for another line, without the knowledge of the vendee. So in case of *Humphrey v. Patrons' Mercantile Association*, 50 Iowa, 607, the debts of the corporation were, by its articles, limited to a certain amount, but the officers of the association, in dealing with Humphreys, exceeded that amount without his knowledge, or means of knowledge, and the corporation was held. *Thompson v. Lambert*, 44 Iowa, 239, belongs to the same class of cases, with the addition that in the last case the stockholders, who objected to what they termed an *ultra vires* contract, were charged with knowledge of and participation in the act they claimed to be illegal, and were in no situation to complain. A corporation cannot retain benefits derived from an *ultra vires* contract, and at the same time treat the contract as entirely void, unless perhaps in cases where the other party has assisted willfully in putting it beyond the power of the corporation to return what is received on such contract.

6 Where the corporation has permitted its officers to engage in *ultra vires* transactions, and in the prosecution of such transactions the officers commit a wrong or tortious act without the fault of the injured party, the corporation is estopped from taking advantage of the *ultra vires* character of the original undertaking.

These rules do not cover all cases, but are sufficient to guide us in the determination of the question of this case.

The case of *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, is relied upon by appellee as authority for holding corporations on *ultra vires* contracts. It is true that the opinion of COMSTOCK, J., in that case, appears not to be in accord with the well-established doctrine of *ultra vires* as applied to corporations, but he says (page 275): "I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing great

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injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholder, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts where no greater equities demand it." In that case the defendants had constructed a railroad not authorized by their charter, and for some years had been operating the same, and made a contract to carry plaintiff over the road. He was injured in a collision occasioned by the negligence of defendants' employees. The plaintiff's cause of action did not arise out of the *ultra vires* contract to carry him, but out of the wrong done on the way, and to which wrong he was not a contributing party. This view is consistent with the sixth proposition above, and is the one in which SHELDON, J., sustained the right of recovery in a very able opinion in the same case, and certainly in line with well-established authorities, and in support of the doctrine of *ultra vires*. None of the other judges sustained the views of COMSTOCK, J., but all, except DENIO, J., sustained the right of recovery. A different question would have been presented in that case if the plaintiff had sued to recover for failure of defendants to transport him according to agreement.

In the case now before us the plaintiff seeks to recover contribution from the corporation as co-surety on the bond of the brewing company, and claims (1) that the contract of suretyship was within the defendant's corporate powers, and (2) that if it were not within defendant's corporate powers, it has so acted on the contract as to now estop it from pleading *ultra vires*. It is claimed that the language of the articles of incorporation, defining its business to be "the general freight and transfer business, and such other business as may not be inconsistent therewith," is of such a general character as to cover almost any kind of business. This position, it seems to us, is not tenable, for the language itself implies that there may be business inconsistent with the general freight and transfer business. The name of the corporation indicated its principal business, and the language is equivalent to saying it may do such other business as is consistent with the freight and transfer business. "Consistent" means standing together, or in agreement with. If the capital of the company is diverted into some other line of business entirely foreign to the freight and

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transfer business, it would be to the detriment of, and therefore not consistent with the latter. But whatever meaning may be attached to the language of the articles, it is quite certain it cannot include the contract of suretyship in question. The simple act of going security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture.

"It is no part of the ordinary business of commercial corporations, and *a fortiori*, still less so of non-commercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, whether in the indirect form of going on accommodation bills, or otherwise becoming liable for the debts of others. *Green's Brice Ultra Vires*, 252; *Madison, etc., Plankroad Co. v. Watertown, etc., Plankroad Co.*, 7 Wis. 59.

It seems to us clear that the corporation defendant had no power to make the contract of suretyship in question, and for the same reasons, it is just as clear that the officers of the corporation had no power to sign the letter of May 27, purporting to assume the payment of the amount stipulated in the bond. Both instruments, so far as the defendant was concerned, were illegal and void, and no attempted ratification by parties having no power to make the original contract could make it valid, no matter how often such attempts were made. It is questionable on the authorities whether even the consent of all the stockholders could make the contract valid, when it was so plainly beyond the powers granted by their corporation, which was in duty to the legislative authority, held to apply its capital to the prosecution of the business for which it was organized and for which it received the grant of power. But this we need not determine. It is very clear however on authority and on principle, that there could not be a ratification without the consent of all the stockholders.

It appears from the record that the note sued on in attachment proceedings, and the proceedings themselves, were taken and carried through without the knowledge or assent of the stockholders or directors, and that the corporation defendant received no benefit therefrom, for whatever was realized therein was applied on the contract of suretyship, which was void as against the defendant,

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and was so applied by plaintiff or other unauthorized parties. *Tracy v. Guthrie Co. Agr'l Soc.*, 47 Iowa, 27.

It is further claimed that the corporation defendant, by its signature to the bond and letter, induced the plaintiff to become liable on the bond and letter also, and induced plaintiff also to pay the amount of the bond. It is stated however in the petition, that the defendant refused to pay its half, and it must be borne in mind, in view of what has preceded, that the brewing company and plaintiff were all the while, at and after the time of signing the bond, charged with notice that the officers of the defendant were not authorized to bind the defendant, and that attempts to do so on their part were illegal and void; and in this respect defendant's stockholders are innocent parties, while the plaintiff is not.

We are therefore of the opinion that the Circuit Court erred in sustaining the demurrer to the answer of the transfer company, and its ruling thereon is reversed and the cause remanded.

Judgment reversed.

STROBLE V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(70 Iowa, 555.)

Master and servant — contributory negligence — using defective machinery.

An employee who uses implements or appliances, in the performance of his master's work, which have become out of repair and unsafe, must either make the necessary repairs himself or report the fact to the employer or person having charge of the repair, and if he omits to do so, and is injured in consequence, he cannot recover from the employer.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Noble & Updegraff, for appellant.

L. Bullis, for appellee.

BECK, J. There was evidence tending to establish the following facts: Plaintiff with another was employed to elevate coal to a platform or other place convenient for delivering it to the tenders of engines. It was often necessary for plaintiff and his co-employee

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working with him to pass to and from the platform to the floor upon which the coal was first deposited. Stairs or steps constructed of planks were provided for the use of these men and others who had occasion to ascend to or descend from the platform. While plaintiff was descending these stairs at the time of the accident, they gave way, and he fell to the floor below, receiving the injuries which constitute the cause of this action. The accident resulted from a defect in the stairs, caused from a break in one of the planks used in their construction, which had been repaired. The defect could have been readily discovered by inspection, if indeed it was not apparent to any one using the stairs. There was no officer or employee of defendant charged with the special duty of inspecting these stairs, to the end that repairs should be made when required. Plaintiff and the man working with him were continuously employed, either in the room where the stairs were, or upon the platform above. There appear to have been no other employees of defendant continuously at work at the same place who were required to use these stairs in the discharge of their duty.

II. The District Court gave the jury the following instruction, introducing the direction given by a question, the answer to which announces the rule of law recognized by the court below: "Was it the plaintiff's duty under his contract of employment, to see that the stairs in question were kept in a reasonably safe condition?" "If you find from the evidence that such was the plaintiff's duty under his contract of employment, the case is at an end, and your verdict will be for the defendant. In deciding this question you will notice particularly what the plaintiff was employed to do, as shown by the evidence, what duties were assigned to him. If he was employed to handle coal at the coal-house, and nothing was said to him by his employer in regard to looking after the safety of the coal-house, or the stairs belonging to the same, then it was not a part of plaintiff's duty to see that the stairs were kept in a reasonably safe condition. You will not construe this instruction to mean, that if plaintiff was not employed to look after the safety of the stairs, he was therefore necessarily relieved from all obligation to notice the stairs. Another instruction upon this point will show you the extent of his duty in this regard.

The instruction referred to in the last paragraph of the foregoing is as follows: "(7) The next question to which I call your attention is this: Did the plaintiff use ordinary care, on his part, to

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avoid or prevent the injuries of which he complains? If he did not, he cannot recover any thing. By ordinary care is here meant that reasonable degree of care which a person of ordinary prudence and caution would use for his own safety, in the situation of the plaintiff, and under circumstances such as surrounded him. The plaintiff was not at liberty, simply because he was a servant not charged with the duty of looking after the stairs, if such was the fact, to shut his eyes to the condition of the stairs that he was himself using. He was required to use ordinary care, in the sense just defined, in observing their condition while using them, and if plaintiff knew of defects in the stairs which would indicate to the ordinary mind that they were unsafe for use, and if he continued to use them in that condition, without reporting their condition to his employer, he was guilty of negligence, and cannot recover. So if for the want of ordinary care and observation, he failed to discover the unsafe condition of the stairs, and for this reason continued to use them until he was injured, he was negligent, and cannot recover."

In the first of these instructions (the fifth), the District Court held that the plaintiff, in the absence of express instructions or requirements, was charged with no duty to look after the safety of the stairs, or to see that they were kept in a reasonably safe condition. In our opinion, the instruction, so far as it announces this rule, is erroneous. A workman who has charge of or uses implements or appliances in the performance of his work is required by the law to exercise proper watchfulness in order to preserve them in a condition which will render them fit for the purposes to which they are devoted, and if they are exposed to wear or destruction from use, he must see that repairs are made, or if he may properly restore them to a fit condition for use, he must do it himself. If such repairs may not be done by him, he must make report of the fact to his employer or other person having charge of the repairs of the thing. The interest of the employer demands the recognition of this rule; and indeed we think it is recognized by all employers and employees, and is discovered instinctively — certainly by the exercise of the common sense shared by all men. And surely, this duty rests with greater weight upon the employee when personal danger to himself or others follows from the use of appliances when out of repair. The instinct of self-preservation and of humanity not only reveals the duty, but prompts to its faithful dis-

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charge. This most beneficent rule of the law extends to all affairs of life wherein the relation of employer and employee exists, and enforces alike the protection of property and of life. The farmer who commits to the charge of his employee implements, machinery and teams for the prosecution of his farm work, the mechanic, the housekeeper, all rely upon the rule for the safety of their property, and the preservation of human life. The facts of the case show that the stairs, the defects of which caused the injury to plaintiff, were an appliance frequently used by him in the prosecution of his work, and they were not under the special care of any employee except plaintiff and his fellow workman. They were subject to the rule we have stated. These views are supported by the following cases: *Lumley v. Cuswell*, 47 Iowa, 159; *Baker v. Allegheny V. R. Co.*, 95 Penn. St. 211; s. c., 40 Am. Rep. 634; *Ballou v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 257; s. c., 41 Am. Rep. 31; *Mad River & L. E. Ry. Co. v. Barber*, 5 Ohio St. 541; *Toledo, W. & W. Ry. Co. v. Eddy*, 72 Ill. 138; *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51. Probably in each of these cases the question of the negligence of the employee was considered and passed upon by the court, but in each of the respective opinions the rule that he owes the duty to inspect the appliance with which he works, and see that it is not out of order, is recognized.

[Minor points omitted.]

Judgment reversed.

AUCHAMPAUGH V. SCHMIDT.

(70 Iowa, 644.)

Statute of limitations — principal and surety.

A claim barred by the statute of limitations as against the principal debtor, is barred also as against the surety.*

ACTION upon a promissory note. The head-note states the point. The plaintiff had judgment below.

Woodward & Cook, for appellant.

E. E. Hasner and Daniel Smyser, for appellee.

See *Cocke v. Hoffman* (5 Lea, 105), 40 Am. Rep. 28.

ADAMS, J. The note was executed to one Schneider, the plaintiff's intestate. The fact that the note was signed by the defendant as surety was proven only by the defendant's wife. An objection was raised to her testimony on the ground that she was an incompetent witness to prove such fact as against an administrator. The court overruled the objection and the evidence was admitted, and no question is now raised as to the correctness of that ruling. If we should be of the opinion that she was incompetent and that there was no proper evidence that the defendant's relation to the note was that of surety, we could not affirm upon that ground because we do not know that the defendant might not have introduced other evidence upon the point if his wife's testimony had been excluded.

We come then to the question raised by the answer and the admitted evidence of suretyship, and that is as to whether a claim, which is barred by the statute of limitations as against the principal debtor, is by reason thereof barred also as against a surety. In answer to this question we have to say that we think it is. No authority has been cited upon either side which is directly in point. Ordinarily we may presume that where the statute has fully run as against the principal, it would happen that it had fully run as against the surety. But the case before us has this peculiarity: The defendant, when the note was executed, resided in Illinois. Before the note was barred by the statute of that State he removed to Iowa, and before the statute of this State had fully run the action was commenced. If then the defendant were a principal debtor the note would not be barred as against him however it might be as against Leipold. He must therefore rely solely upon the fact that he is surety, upon the note, and upon the bar as against Leipold. Such being the case it is perhaps not surprising that no authority should be cited that is precisely in point. It becomes our duty therefore to attempt to determine the case on principle. It would not be denied that a surety upon a note may set up any meritorious defense which the principal, if sued, might set up in his own behalf. Now when the statute of limitations has run as against the principal, the law excuses him from setting up any meritorious defense which he may have and allows him to rely upon the technical defense of the statute alone. The theory is that he was not under obligations to preserve any longer the evidence of his meritorious defense if he had any, and

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so the court will not inquire whether he had such defense or not. The statute has been very properly denominated the statute of repose. As the surety is allowed to set up any meritorious defense which the principal might have set up, we are not able to see why he should be required to preserve the evidence of such defense after the principal was not bound to do so. Again when a surety pays a debt, it is his right to look to the principal for reimbursement. But a surety paying a debt after it had become barred as against the principal would be remediless. Now we do not think that a creditor, by his own dilatoriness, should be allowed to put the surety in such position. It is not a full answer to say that a surety might have protected himself. It may be conceded that he might. But practically sureties often overlook their obligations if their attention is not called to them and we do not think that the just protection of the rights of the creditor requires that we should hold so strict a rule against them as that for which the plaintiff contends.

It is said however that the defendant, if he is allowed to plead the bar of the statute at all as against the principal, should have averred and shown that no judgment in fact had been rendered against the principal. But we think that we would be justified in assuming, from the plea made, that judgment had not been rendered until it was averred and shown by the plaintiff to the contrary.

Judgment reversed.

GARRETT V. BURLINGTON PLOW COMPANY.

(70 Iowa, 687.)

Corporation—debt of insolvent corporation to directors beyond prescribed limit—preference.

Where a debt of a corporation beyond the limit prescribed by its charter was held by its directors, and they in good faith took a mortgage on the property of the corporation for security, they may enforce such security, even though they participated in the management of the corporate business in such a way as to permit the accumulation of the debt beyond the allowed limit, and though the corporation was insolvent when the mortgage was taken, and the mortgage gave them a preference over other creditors. (*See note, p. 466.*)

ACTION of foreclosure. The opinion states the case. The plaintiff had judgment below.

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P. H. Smyth & Son, Poor & Baldwin, S. L. Glasgow and J. T. Illick, for appellants.

J. C. Power and Newman & Blake, for appellee.

BECK, J. I. The questions presented in this case arise upon the ruling of the District Court in sustaining a demurrer to the answers of defendant to plaintiff's petition. It therefore becomes necessary to state with particularity the pleadings in the case, especially the answers held upon the demurrer to present insufficient defenses to the action.

The petition alleges the corporate character of defendant the Burlington Plow Company, and that being indebted by promissory notes to the Iowa State Savings Bank in the amount of \$10,000, to Rubie D. Tuttle and Lauren Tuttle in sums of \$7,295.93 and \$6,641.81, respectively, it executed to plaintiff, as trustee, a mortgage upon real and personal property, to secure its indebtedness to these several parties. The petition prays for judgment upon the several promissory notes, and the foreclosure of the mortgage. The petition alleges that after the plow company executed the mortgage to plaintiff it made an assignment of its property, for the benefit of its creditors, to Christian Mathes, who is made a defendant to the action.

In an answer and amended answer, she pleads the following matters as defenses:

The plow company is indebted to various creditors, other than the persons for whom plaintiff is trustee, in the sum of \$21,400. Its capital stock, authorized by the articles of incorporation, is \$50,000, of which \$25,000 was subscribed. Its indebtedness was limited by its articles of incorporation to two-thirds of the amount of its capital stock. At the time of the assignment, its indebtedness exceeded \$50,000. No provision is made in the mortgage for the application of the proceeds of the sale by the mortgagor of personal property covered thereby to the payment of the debts secured, manufactured articles and material therefor being covered by the mortgage, of which the company was to retain possession. The promissory note to the savings bank was indorsed by E. D. Rand, one of the incorporators and a director of the company, who is solvent. Rubie D. Tuttle, to whom another note is payable, is one of the incorporators, and the wife of another incorporator, S. S.

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Tuttle, who is secretary of the company. The other note was executed to the administrator of Lauren Tuttle, another incorporator, and father of S. S. Tuttle. Rand and S. S. Tuttle have been directors of the company since its organization, and Lauren Tuttle was a director up to the time of his death.

The directors, with knowledge of the existence or corporate debts beyond the limit prescribed by the articles of incorporation, and the insolvency of the company, and knowing that the other creditors who had given it credit in ignorance of these things were pressing their claims, caused the mortgage in suit to be executed in order to indemnify themselves. On the day after the execution of the mortgage, they transferred to the National State Bank of Burlington, notes and accounts to the amount of \$40,000, the proceeds of which were to be applied, first, in payment of the sum of \$18,000, owed by the company to that bank, and the balance to be applied in payment of the indebtedness secured by the mortgage in suit. The claims thus transferred, and the property covered by the mortgage, constituted substantially all the property of the plow company. After the death of Lauren Tuttle, no person was chosen to fill his place in the board of directors of the incorporation.

The creditors whose claims were not secured reposed great confidence in the business character and integrity of the directors, especially of Rand, who is a man of great wealth. These directors concealed the amount of indebtedness of the company, and the other creditors having no knowledge on the subject, believed it was solvent and therefore gave it credit. Two of the directors of the company are the heirs of Lauren Tuttle, deceased, and the consideration of the death to Rubie D. Tuttle, was the property of her husband, one of the directors. She and the administrator of the estate of Lauren Tuttle had notice when the notes were executed that the indebtedness of the incorporation exceeded the limit prescribed by its articles of incorporation. The money was obtained upon the note to the Iowa Savings Bank, upon the credit of the directors, who indorsed it, or guaranteed its payment.

Other matters are alleged in the answers of like import as the foregoing, tending to show that the directors acted in the execution of the mortgage for their own protection, which need not be here more specifically noticed. It is finally charged that the execution of the mortgage, and the transfer of the notes to the national bank, being a disposition of all the property of the plow company,

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amounts, in effect, to a general assignment of its property, with preferences to certain of the creditors, and is therefore invalid.

Plaintiff, by demurrer, assailed the answers of defendants on the ground that no defense to the action is pleaded therein.

II. It will be observed that it is not alleged in defendant's answers that either of the notes secured by the mortgage was not executed in good faith, for the full consideration shown upon its face; nor is it alleged that any fraud was practiced by either of the payees in procuring the notes. The mortgage is assailed on the ground that the payees of two of the notes were stockholders and directors in the plow company, or held such relations to the directors that their rights were no other than the rights held by the directors.

The transaction, so far as it involves the indebtedness to the Iowa State Savings Bank, is questioned upon the ground that the directors of the company are indorsers or guarantors upon the note given therefor. We are required to consider the rights of the holders of these notes separately. It may be assumed for the purposes of the case, that the notes given to Rubie D. Tuttle, and the administrator of the estate of Lauren Tuttle, are to be regarded as though they were given to and held by a director of the company. The case in this view presents questions as to the rights of directors of a corporation holding its notes secured by mortgage upon its property, which were given under the circumstances recited in defendant's answers. As we have just stated, the good faith of the indebtedness of the corporation is not brought in question.

Do the facts allege in the answer, that the holders of the notes, as directors of the company, in the management of its affairs, contracted indebtedness beyond the limit prescribed by the articles of incorporation, and caused the mortgage to be executed to secure the amount due them, defeat their security, and give other creditors a right to share in the proceeds of the property mortgaged? We do not understand counsel for defendants to claim that a debt of a corporation beyond the prescribed limits of its indebtedness is invalid, and if held by a director of the corporation, cannot be enforced for that reason alone. It may be that a director would be answerable to stockholders or others for negligence or mismanagement of the affairs of a corporation whereby debts were contracted in excess of the limitation prescribed in the articles of incorporation; but it cannot be claimed that such a debt, for a consideration received by the corporation, cannot be enforced against

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it. May a director enforce such a debt? We understand that he may become a creditor of the corporation, may advance it money, or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor; and if the debt he holds was contracted in good faith, and there is an absence of fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim.

Counsel for defendants admit this proposition, with an exception in the case of the insolvency of the corporation. They insist that the directors of an insolvent corporation cannot take from it security, by mortgage or other conveyance creating a lien upon its property, even though given in good faith, and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If therefore a director holds the indebtedness of an insolvent corporation, he may take payment or security in good faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security. If the property, money or other consideration of the debt, was fairly used for the benefit of the corporation, was added to its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors.

It is not shown in the answer of defendants that there was any bad faith or dishonest practices on the part of the creditors for whom plaintiff is trustee, in becoming creditors of the plow company, and taking security from it. It is true that the courts will scan with care, and even with suspicion, such transactions, and demand that they be accompanied by the utmost good faith. Defendant's answers make no charge of bad faith or fraud in the creation of the debt, or the execution of the mortgage. It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claims in controversy. As we have before said, they may be liable to proper parties for their

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negligence or unlawful acts, but honest contracts made with them are not defeated thereby.

Our views above expressed are in harmony with familiar rules of the law, and are supported by the following decisions of this court: *Buell v. Buckingham*, 16 Iowa, 284; *Farmers & Merchants' Bank of Lineville v. Wasson*, 48 Iowa, 336; s. c., 30 Am. Rep. 398; *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178. Decisions of other courts, which need not be cited, are to the same effect.

Counsel for defendants cite two or three cases, which they claimed are in conflict with our conclusions, the more important one being *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639. This case, and the decisions cited in it, we think do not give support to counsel's position.

[Omitting minor points.]

The judgment of the District Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Post v. Russell*, 36 Ind. 60; s. c., 10 Am. Rep. 5, and note, 12; *Hoyle v. P. & M. R. Co.*, 54 N. Y. 314; s. c., 13 Am. Rep. 595.

In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, cited in the principal case, the court said: "The main question is of the validity of the mortgage in suit. There was abundant evidence to justify the finding of the Circuit Court that at the time it was given the company was insolvent. In such case the authorities seem to be uniform that the directors and officers of the corporation are trustees of the creditors and must manage its property and assets with strict regard to their interests, and if they are themselves creditors while the insolvent corporation is under their management, they cannot secure to themselves any preference or advantage over other creditors. The directors are then trustees of all the property of the corporation for all of its creditors, and an equal distribution must be made, and no preference to any one of the creditors, and much less to the directors or trustees as such. I have carefully examined all the authorities cited on both sides touching this principle and find it recognized in every case. Many of the authorities cited by the learned counsel of the appellants as holding a contrary doctrine state this doctrine as fully established, and cite many of the authorities in its favor cited here by the learned counsel of the respondents, and cases are made an exception only because in their facts this principle has no application. It is reiterated in the text of elementary works, and numerous cases are cited to sustain it. *Morawetz Priv. Corp.*, §§ 579-581. A few only of the cases holding this principle will be cited here, but many others may be found in the brief of counsel and elsewhere too numerous for citation. *Marr v. Bank of Tenn.*, 4 Coldw. 471, 484; *Koehler v. Black R. Falls Iron Co.*, 2 Black, 715; *Curran v. Arkansas*, 15 How. 306; *Richards v. N. H. Ins. Co.*, 43 N. H. 263; *Bradley v. Farwell*, 1

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Holmes, 433; *Drury v. Cross*, 7 Wall. 299; *Paine v. L. E. & L. R. Co.*, 31 Ind. 353; *Gas Light Co. v. Terrell*, L. R., 10 Eq. Cas. 168. I have been unable to find a single case, which in its facts is like this, in which this doctrine is even questioned and was not strictly applied.

"But there is another principle equally unquestionable which renders the mortgage in suit void. The directors and officers made the mortgage, or directly caused it to be made to themselves. They occupied a fiduciary relation to the corporation, its stockholders and its creditors, and they had no right to use such relation and their official position for their own benefit, to the injury of others in equal right. This principle was applied to the taking of a mortgage by the directors on the property of the corporation to secure their liability as sureties upon a note of the corporation, in *Corbett v. Woodward*, 5 Sawy. 408, which is a strong case; and very similar is the case of *Koehler v. Black R. Falls Iron Co.*, *supra*. See also *Morawetz Priv. Corp.* 248; *Hoyle v. P. & M. R. Co.*, 54 N. Y. 814; s. c., 13 Am. Rep. 595; *E. & N. A. R. Co. v. Poor*, 59 Me. 277; *Butts v. Wood*, 38 Barb. 188; *Y. & N. M. R. Co. v. Hudson*, 19 Eng. L. & Eq. 365; *Scott v. Depeyster*, 1 Edw. Ch. 518; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 85; *G. L. R. Co. v. Magnay*, 25 Beav. 586; 1 *Perry Trusts*, § 194, and cases cited. But it is really unnecessary to cite cases from abroad when the same principles have been established in our own cases, as in *Cook v. Berlin W. M. Co.*, 48 Wis. 484, and *Pickett v. School District*, 25 Wis. 558.

"Directors, officers and agents, and other like trustees, cannot mortgage or convey to themselves any more than one can contract with himself. The idea that the same persons constitute different identities of themselves by being called directors or officers of a corporation so that as directors or officers, they can convey or mortgage to or contract with themselves as private persons, is in violation of common sense. *In re Taylor Orphan Asylum*, 36 Wis. 552, and cases above cited. See 1 *Perry Trusts*, § 207, and *Morawetz Priv. Corp.*, § 245; *Walsworth Co. Bank v. Farmers' L. & T. Co.*, 16 Wis. 629; *Cumberland C. & I. Co. v. Sherman*, 80 Barb. 558.

"It is unnecessary to decide the question whether there was a quorum of disinterested directors that directed the mortgage to be given. The mortgage is an entirety, and it makes no difference how many persons are severally interested in its mortgagees. If such mortgagees, as directors, authorized it, they authorized an act in which they were all jointly interested. They may not have been joint creditors, but they are joint mortgagees, because the mortgage as a security is an entirety. Whether in this view the mortgage was never authorized to be given by the president and secretary of the company, by the company through its directors, it may not be necessary to decide; but it seems to me rather illogical to say that because there is a quorum of directors who are creditors severally, a majority of them may authorize their claims to be secured by one mortgage, and do not act on their own claims, but each one acts in respect to the claims of the other. If A., B. and C. are several creditors and a quorum of directors, and A. and B. vote to give C. an interest in the mortgage to secure his claim, A. and C. so vote as to the claim of B., and B. and C. as to the claim of A., do they not vote for themselves in respect

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to one mortgage? This would be an ingenious and convenient collusion to vote to themselves all the property of the corporation at almost any time on the ground that the majority so voting is disinterested and impartial.

"But it is very clear to us that the mortgage is void in view of the above principles, and that disposes of the action of foreclosure."

In *European, etc., Ry. Co. v. Poor*, 59 Me. 277, the principles governing this subject are so well stated by Chief Justice APPLETON, and so many of the cases reviewed, that we subjoin the opinion entire:

"A trustee is one in whom property is vested in trust for others. Every person is to be deemed a trustee to whom the business and interests of others are confided, and to whom the management of their affairs is intrusted. The general rule is that a trustee, so far as the trust extends, can never become a purchaser of the property embraced within the trust save with the consent of all parties interested. The underlying principle is that no man can serve two masters. He who is acting for others cannot be permitted to act adversely to his principals. The agent to sell cannot become a purchaser of that which he is the agent to sell, for his position as selling agent is adverse to and inconsistent with that of a purchaser. So the agent to purchase cannot at the same time occupy the position of a seller. It is not that in particular instances the sale or the purchase may not be reasonable. But to avoid temptation the agent to sell is disqualified from purchasing and the agent to purchase from selling. In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sales or purchases if he deems it for his interest. The affirmance or disaffirmance rests with him and the trustee when buying trust property from or selling it to himself, must assume the risk of having his contracts set aside, if the *cestui que trust* is dissatisfied with his action.

"The rule of equity is liberal, embracing within its purview all fiduciary relations, as those of principal and agent, attorney and client, solicitors, executors, guardians, etc.

"The president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders for and in behalf of whom they act. 'The relation between the directors of a corporation and its stockholders,' observes JOHNSON, J., in *Butts v. Wood*, 88 Barb. 188, 'is that of trustee and *cestui que trust*.' 'The directors,' remarks ROMILLY, M. R., in the *York & Midland Railway Co. v. Hudson*, 19 Eng. L. & Eq. 865, 'are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust, which if they undertake it is their duty to perform fully and entirely.' Persons, who become directors and managers of a corporation place themselves in the situation of trustees; and the relation of trustees and *cestui que trust* is thereby created between them and the stockholders. *Scott v. Depeyster*, 1 Edw. Ch. 518; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 85. All acts done by the directors officially should be for the interests of the *cestui que trust*. Holding a fiduciary relation they cannot be permitted to acquire interests adverse to such relation.

"The bill alleges that 'at a meeting of the directors of said company (the E. & N. A. Railway Co.), holden on the 25th day of August, 1865, a contract

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previously made between said company and a certain firm under the name of Pierce & Blaisdell, and signed by said defendant, as president of said company, and by said Pierce & Blaisdell, for the construction of said railroad, was approved, adopted and confirmed. The said Pierce & Blaisdell did proceed under said contract in the construction of said railroad and received large sums of money under the same contract,' and 'that there was an agreement between said defendant while he was president and director as aforesaid, and said firm of Pierce & Blaisdell, or one of the members of said firm, that said defendant should receive a large sum of money for or on account of said contract, or a part of the profits which might be received by said Pierce & Blaisdell under and by their performance of said contract, for the construction of said railroad.'

"To this portion of the bill the defendant has demurred, thereby admitting, for the purposes of the present argument, his interest in the contract of Pierce & Blaisdell with the corporation of which he was president and a director, made when he was acting as such and in the profits of which he was a participant while holding those positions.

"As the agent to sell cannot purchase what he is to sell, nor the agent to purchase buy of himself, so the agent to contract cannot as agent contract with himself as principal. The interests of the parties to a contract, whether of purchase, a sale, or for work or labor, are adverse and inconsistent with each other. It is the duty of the directors of a corporation to act for the best interests of such corporation. If a director be a party to a contract entered into with himself, his duty as an officer is in conflict with his interests as an individual. This is equally so, whether he enters into the contract in its inception or subsequently acquires an interest in it. If he enters originally into the contract as director with himself as a party, it is not difficult to perceive who would have an advantage in the bargain. If he subsequently becomes a partner he places himself in a position, in which, when any questions arise as to its performance his interest as a party to the contract conflicts with his duty as an officer. The general rule is, that directors cannot legitimately acquire an interest adverse to the corporation, and that if they purchase any claim against the company it is in trust for the company.

"In *Great Luxemburgh Ry. Co. v. Magenay*, 25 Beav. 586, the master of the rolls says: 'I have, upon various occasions, stated what I considered to be the duties and functions of a director of a joint-stock company. He is, in point of fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into in their behalf, to be treated as an agent; therefore there attaches to a director, for the benefit of the shareholders, all the liabilities and duties which attach to a trustee or agent. Accordingly, if a director enters into a contract for the company, he cannot personally derive any benefit from it. I accordingly held, in the case of *Midland Ry. Co. v. Hudson*, that the defendant, as director and trustee, was bound to give to the company the benefit of a large contract, entered into by him for iron, which had been used on the railroad, and to render to them the pecuniary advantage which he had derived from it. * * * If as in the case of *North Midland Ry. Co. v. Hudson*, a director of a railway company enter into a contract for the purchase of a large quantity of iron in

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the shape of rails, but before it is wanted and before it has been actually delivered (for it took some time in that case to perform the contract with the iron-master), the price of iron should happen to rise, the trustee is not at liberty to put into his pocket the difference between the market price of the iron when delivered and that at which it was purchased. He cannot sell it again to the company as if it were his own property. The whole benefit must go to the shareholders and not to the director.'

"In *Benson v. Heather*, 1 Y. & Coll. 326, the defendant, being director of a joint stock company, established for the building, purchasing, hiring and employment of steam vessels, purchases a vessel for £1,840, and after sells it to the company as from a stranger, for £1,500, charging the company with commission at £1 per cent, the broker's earnest-money and the expenses of a bill of sale to himself, there being but one bill of sale. It was held that such a transaction could not stand in equity.

"In *Flint & R. Co. v. Dewey*, 14 Mich. 477, it appeared that the defendant, the secretary, and another director had been appointed a committee by the company for building and equipping the road. The committee entered into a preliminary contract with a certain party and on the same day that party assigned to the defendant secretary three-eighths of said agreement and four-tenths of a contract to be thereafter entered into; also providing that they should be at three-eighths the expense of negotiating the bonds of the company, which were to be received by the contractor. In a suit by the complainant to compel the delivery of said bonds, it was held that the transaction under which the defendant claimed was clearly fraudulent and void as against the complainant; that it was his duty (with the other members of the committee) in letting the contract to use his best efforts and judgment to secure the best terms he could for the company; but in joining with the contractor in taking this very contract, which they were employed to let, it became his interest to let the contract at the highest price. 'It is possible,' observes CHRISTIANCY, J., that there may have been no actual fraud, and that the contract would not have been let on better terms; but the principle of law applicable to such a contract renders it immaterial, under the circumstances of the case, whether there has been any fraud in fact, or any injury to the company. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. And if such contracts were to stand until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption.' 'The general rule of law,' observes WAYNE, J., in *Michaud v. Girod*, 4 How. 555, 'stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private.' To give effect to these views in England it is provided by the Companies Clause Consolidation Act, 8 and 9 Vict., chap. 16, that no person interested in a contract with the company shall be a director; and if any director, subsequent to his election, shall become concerned in any contract, the office of director shall become vacant, and he shall cease to act as such."

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In the *Koehler* case, above cited, the court said: "In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees."

Morawetz Priv. Corp., § 517, says: "The directors of a corporation have no authority to bind the company to any contract made with themselves personally."

Both on the ground of preference over other creditors and the ground of agency, we regard the principal case as very questionable, in principle, while the authorities above cited seem irreconcilable with it.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

SAUNDERS V. REILLY.

(105 N. Y. 12.)

Partnership—judgment on joint obligation of all partners—rights of creditors.

On a judgment against all the members of a firm upon a joint obligation, not an indebtedness of the firm, the property of the firm may be levied on and sold, and the purchaser will acquire absolute title as against subsequent creditors of the firm, although it may be insolvent.

ACTION for a false return of execution. The opinion states the case. The plaintiff had judgment below.

Henry Thompson, for appellant.

George H. Forster, for respondents.

EARL, J. This action was brought by the plaintiffs against the defendant, late sheriff of the city and county of New York, to recover damages against him for making a false return to an execution issued upon a judgment recovered by the plaintiffs against William T. Tooker and Thomas J. Irwin, who were partners under the firm name of Tooker & Irwin. The action was put at issue by the answer of the defendant and brought to trial at a Circuit Court, and the trial judge, after the close of the evidence, directed a verdict for the plaintiffs. The defendant appealed from the judgment entered upon that verdict to the General Term and from affirmance there to this court.

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The material facts are as follows: In January and February, 1879, William T. Tooker and Thomas J. Irwin were partners under the firm name of Tooker & Irwin, carrying on business in the city of New York. At the same time Tooker & Irwin, together with Julius A. Candee and Daniel Webster Arnold, were partners under the firm name of Tooker, Arnold & Co., also carrying on business in the city of New York. In the latter firm Arnold's share was three-twelfths, Candee's share four-twelfths and Tooker and Irwin's share, jointly, five-twelfths. On the 16th day of January, 1879, these plaintiffs recovered a judgment against Tooker & Irwin for upward of \$800, and early on the next day they issued and placed in the hands of the sheriff an execution on that judgment. Later on the same day Jane Irwin issued an execution to the sheriff on a judgment recovered by her for upward of \$7,000 against the firm of Tooker, Arnold & Co. The sheriff, under these executions, levied on the personal property of Tooker & Irwin and advertised the same for sale. These plaintiffs then having a further claim for goods sold to the firm of Tooker & Irwin, which was not then in judgment, gave notice to the sheriff on January twenty-third that as creditors of the firm of Tooker & Irwin, they claimed the application of the firm property to the payment of the firm debts, and they forbade any sale of the assets of the firm under the execution issued by Jane Irwin on her judgment against Tooker, Arnold & Co. On February seventh the sheriff, after selling enough of the firm property to satisfy the executions then in his hands against the firm of Tooker & Irwin, proceeded to sell the balance of the property on the execution in his hands in favor of Jane Irwin. In making that part of the sale he announced that he sold the right, title and interest of Tooker & Irwin, or either of them, in the property. On the 17th day of February, 1879, the plaintiff recovered judgment against the firm of Tooker & Irwin on their second claim against that firm, which was duly docketed and execution thereon issued on the same day to the sheriff. At the same time their attorney wrote to the sheriff that they required him, under that execution, to levy on any of the assets of the firm of Tooker & Irwin of which he had only sold the interest of William T. Tooker, individually, and Thomas J. Irwin, individually, under the execution issued by Jane Irwin, and that if he had sold under the execution issued to him by Jane Irwin any of the assets of the firm, notwithstanding the notice which the plaintiffs had given him,

then they required him to apply the proceeds of such sale to their execution. That execution he returned unsatisfied, and that is the return which the plaintiffs complained of as false.

The property sold on the execution issued by Jane Irwin, or some of it, was still accessible to the defendant and ample to satisfy the plaintiffs' last execution if the defendant had the right and was bound to seize it notwithstanding the prior sale.

The claim of the plaintiffs, which has been sustained by the court below, is that the sale upon the execution issued upon the judgment of Jane Irwin simply operated as a sale of the separate interests of Tooker & Irwin in the firm property, and not as a sale of the *corpus* of the firm property; and thus no greater effect was given to the sale than if it had been made by virtue of two executions upon judgments separately recovered against Tooker and against Irwin.

The decision below was based upon the authority of *Menagh v. Whitwell*, 52 N. Y. 146; s. c., 11 Am. Rep. 683. But we are of opinion that that case cannot properly be invoked as an authority for the decision made below, and that the principle there decided was misapplied by the learned court.

A mere general creditor of a firm having no execution or attachment has no lien whatever upon the personal assets of the firm. But when a firm becomes insolvent, and thus it becomes necessary to administer its affairs in insolvency or in a court of equity, then the rule is well settled that firm property must be devoted to firm debts and individual property to the payment of the individual debts of the members of the firm. If one member of a firm conveys to a person, not a member of the firm, all his interest in the firm property, the purchaser takes no part of the *corpus* of the firm property, but only such interest as remains after the equities between the partners have been adjusted and the firm debts have been paid and satisfied. So too it was decided by the case above cited that if all the members of a firm should severally convey to different persons each his interest in the firm property, the persons so purchasing would not take any of the *corpus* of the firm property, but only the interest of each partner after the firm debts were paid, and the equities between the partners adjusted. It is also settled that it would be a fraud upon firm creditors for a member of a firm to take firm property and apply it upon his individual debts, or for the firm to take firm property and apply it upon the individual debts of any member of the firm. *Ransom v. Vandevanter*, 41

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Barb. 307; *Wilson v. Robertson*, 21 N. Y. 587. But one of two partners may transfer all of his interest in the partnership property to his copartner, and the purchasing partner will be vested with the absolute title to the *corpus* of all of the partnership property, as if it had always belonged to him. *Stanton v. Westover*, 101 N. Y. 265. And all members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash they may transfer firm property to pay a firm debt. And they may transfer the firm property to pay a joint debt for which they are jointly liable outside of the business of the firm, and the joint creditor will obtain a good title to the firm property. Therefore while firm property will not pass under successive sales upon executions issued against the individual partners, we can see no reason to doubt that such property will pass under a sale upon a joint execution against all the partners, issued upon a judgment recovered for any joint debt whatever.

Upon the facts of this case it is entirely clear that Tooker & Irwin could have taken their firm property and applied it upon this joint judgment against them; and inasmuch as they had the power and right to do that, they could have turned it out to the sheriff when he came with the joint execution against them; and as they could have turned it out upon the debt before judgment, or upon the execution after judgment, there can be no reason to doubt that the sheriff could take and sell it upon the execution free from the claim of their firm creditors. After this sale of the firm property upon a joint judgment against both members of the firm, no equity was left in either member of the firm to have the property thereafter applied in discharge of the firm debts. Having been applied in discharge of the joint debt against both members of the firm, all the equities of both members in the property, as against each other, were wiped out; and it is only through the equity which one member of a firm has in the firm property or against his copartners that firm creditors, on the principle of subrogation, can enforce their claims against the firm property. And so, in effect, it was held in the case of *Menagh v. Whitwell*, and *Stanton v. Westover*, *supra*. In 3 Kent Com. 65, it is said that "creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners operating to the payment of the partnership debts." In *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; s. c., 49

Am. Dec. 160, it was said by the chancellor: "The copartners however have certain equitable rights between themselves, arising out of the copartnership by which either can compel the other to have all the effects of the firm applied in the first place to the payment of the debts due from them as copartners. And this, as is said in the books, gives the joint creditors a *quasi* equitable lien upon the property of the firm, to be worked out through the medium of the equity of the copartners as between themselves, and with their assent, or at least with the assent of one of them." In *Case v. Beauregard*, 99 U. S. 119, Mr. Justice STRONG said: "No doubt the effects of a partnership belong to it so long as it continues in existence and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm, and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of the firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity however is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence if he is not in a condition to enforce it, the creditors of the firm cannot be. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration." In *Fitzpatrick v. Flannagan*, 106 U. S. 648, Mr. Justice MATTHEWS said: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to the creditors of an individual partner, is

derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration."

Therefore, after the sale of the joint property upon a joint judgment, although the judgment was not recovered upon a debt against the separate firm of Tooker & Irwin, there were no rights, legal or equitable, left to either member of the firm, in the property, and therefore no equity in the firm property to be worked out under them by any of the firm creditors.

The statute (Code, § 1369) requires the sheriff to satisfy an execution against property "out of the personal property of the judgment-debtor," and if sufficient personal property cannot be found, then out of the real property belonging to him. There is no statute or rule of law which requires the sheriff to satisfy a joint execution out of the joint property of the execution debtors, or out of the separate property of each debtor. He may satisfy such an execution out of the joint property, or out of the separate property of any one or more of the debtors. In 1 Lindley on Part. 515, it is said, that "although the writ of execution on a joint judgment must be joint in form, it may be levied upon all or any one or more of the persons named in it," and that "the consequence of this is, that the sheriff may execute a writ issued against several partners jointly, either on their joint property or on the separate property of any one or more of them, or both on their joint or their respective separate property. And so long as there is within the sheriff's bailiwick any property of the partners or any of them, a return of *nulla bona* is improper." And these rules have now been embodied in section 1935 of the Code.

As between themselves Tooker & Irwin were jointly liable for the debts of Tooker, Arnold & Co., and neither can complain that their joint property has been taken to satisfy such joint liability.

The fact that the sheriff, when he made the sale of this property on the execution in favor of Jane Irwin, announced that he sold the right, title and interest of Tooker & Irwin or either of them,

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in the property, can make no difference. He sold all he had the right to sell by virtue of his execution and if he sold all the right, title and interest of Tooker & Irwin in that property, he sold the whole of it, and gave good title to the purchaser. He therefore had no right to seize any of that property again and sell by virtue of the plaintiff's execution, and his return was not false.

The general denial contained in the defendants' answer put in issue the material allegations of the complaint, and was sufficient to authorize the defense asserted by the defendant.

The judgment should therefore be reversed and a new trial granted, costs to abide event. *Judgment reversed.*

All concur except RUGER, C. J., not voting; ANDREWS, J., concurring in result.

IN MATTER OF NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY.

(105 N. Y. 82.)

Will — construction — "dying without issue."

The will of E. devised and bequeathed to her daughter, Minnie, all her real and personal estate, subject to the payment of certain legacies charged thereon. In case of the death of Minnie, "without issue," the property was given to the husband and a sister of the testatrix during life, and after their deaths to four brothers. The clause ended as follows: "The devise over to my husband, sister and brothers, to depend upon the contingency of my daughter Minnie dying without issue." Minnie survived the testatrix. *Held*, that she took a conditional fee, defeasible by her dying without leaving issue living at the time of her death; that her children, should she leave any, would inherit from her, but a conveyance by her would be effectual against them, and carry an indefeasible title in fee, and that the contingent expectant estate, limited to the husband, sister and brothers, would be cut off by their joining with her in the conveyance.*

A PPEAL from order directing the payment of moneys awarded as compensation for lands condemned. The head-note states the point.

M. H. McMatt, for appellant.

Charles J. Bissell, for respondents.

* See note, 55 Am. Rep. 774.

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RAPALLO, J. It may be regarded as a settled rule of construction that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first named devisee during the life-time of the testator, and that if such devisee survives the testator, he takes an absolute fee; that the words of contingency do not create a remainder over to take effect upon the death, at any time, of the first taker, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator. This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator.

The reason assigned for this construction has been that as death is a certain event, and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period, and no other being mentioned, the time referred to must be presumed to have been the testator's own death. It is also founded upon the principle that in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one which has been adopted would in every case reduce the estate of the first named devisee to an estate for life, for his death at some time is certain, and the words of inheritance attached to the devise to him would in every case be inoperative.

Nevertheless it has been held that the same rule of construction is to be applied where the alternative devise is made to depend upon the death of the first-named devisee "without issue" or "without children," etc. This question is thoroughly discussed in the opinion of ANDREWS, J., in the case of *Van Derzee v. Slingerland*, 103 N. Y. 47; s. c., 57 Am. Rep. 701, and the learned judge comes to the conclusion, that although the reason upon which the rule adopted in the first-mentioned class of cases was founded, does not exist in the second, yet that it is established by precedent. It would be useless now to go through the cases. They are very numerous, and not all reconcilable, and many of them contain special features. It is sufficient for present purposes to refer to a few of the cases. In *Gee v. Mayor, etc., of Manchester*, 17 Ad. & El. (N. S.) 737, the testator devised and bequeathed his real and personal estate to be divided equally among his children as follows, viz.: "I will and bequeath to my eldest son A. one-

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seventh share of my property, to his heirs, executors and administrators." Then followed similar devises and bequests to each of the testator's six other children, and afterward a general provision in these words, "and in case any of my sons and daughters die without issue that their share returns to my sons and daughters equally amongst them, and in case any of my sons and daughters die and leaving issue, that they take their deceased parents' share."

It was held that the death referred to was a death in the life-time of the testator, and that all his children having survived him, they each took a fee-simple in one-seventh of his realty.

It must be observed that unless that construction was adopted, the words of inheritance attached to the devise to each of the testator's children must in every event be rejected.

It was certain that each of the children would die, either with or without issue. Construing the death referred to by the testator as a death at any time, the result would be that upon the death of either of the testator's sons, for instance, without issue, his share would go to his brothers and sisters, not as his heirs, but as purchasers by virtue of the limitation over to them. If he died leaving issue, such issue would take in like manner, not as his heirs, but as purchasers. He would have no estate of inheritance in any event, and could make no disposition of the fee in the realty, in his life-time, or by will. The words of the testator purporting to give him an estate in fee would thus be wholly rejected, and his estate, under all circumstances, cut down to a life estate.

It was on these grounds that Lord CAMPBELL, in delivering the judgment of the court, held that the only mode of giving effect to all the words of the testator was by treating the words in the last clause of the will as words of substitution only, in case of a lapse, and referring the death there contemplated to a death in the life-time of the testator.

In *Clayton v. Lowe*, 5 Barn. & Ald. 636, the devise was in the same form as in the case last cited. The estate was given to the testator's three grandchildren, forever. If either of them should die without lawful child or children, the share of the one so dying was to be divided among the survivors, but if either should die leaving lawful child or children, such child or children should take the share of the parent. It is obvious that unless the death referred to was a death in the life-time of the testator, the first-named devisees could in no event take a fee.

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Doe v. Sparrow, 13 East, 359, was a case of the same description, with additional significant words expressly referring to the testator's own death.

Woodburne v. Woodburne, 23 L. J. Ch. 336, was the same as *Gee v. Mayor of Manchester*, and was decided the same way.

The cases I have referred to rest on principles and are founded on reasons which are easily comprehended; but there are other cases in which the words "die without issue" are construed as referring to a death in the life-time of the testator, where those principles are inapplicable and the reasons do not exist, and of such cases ANDREWS, J., in the case of *Vanderzee v. Slingerland*, says that they stand more upon authority than upon reason.

It is stated in Jarm. Wills (5 Am. ed.), 783, that the general rule is that, where the context is silent, the words referring to the death of the prior legatee in connection with some collateral event, apply to the contingency happening, as well after as before the death of the testator.

In *O'Mahoney v. Burdell*, L. R., 7 H. L. 388, 393, it was held that a bequest to A., and if she should die unmarried or without children, to B., was an absolute gift to A., defeasible by an executory gift over in the event of A. dying at any time, unmarried or without children, and that this construction could only be affected by a context which rendered a different meaning necessary. And in *Britton v. Thornton*, 112 U. S. 526, it was held that under a devise to one person in fee, and in case he should die under age and without children, to another in fee, the devise over would take effect upon the death, at any time, of the first devisee under age and without children. To the same effect is *Edwards v. Edwards*, 15 Beav. 357, and see *Doe v. Webber*, 1 Barn. & Ald. 713, and *Anderson v. Jackson*, 16 Johns. 382; s. c., 8 Am. Dec. 330. But it cannot be disputed that there are several cases holding that where there is simply a devise to A. in fee, and in the event of his dying without issue, then to B., the death referred to is a death in the life-time of the testator, and if A. survives him he takes an absolute and indefeasible estate in fee. *Horne v. Pillans*, 2 My. & K. 15, 19, and cases cited; *Ware v. Watson*, 7 DeG., M. & G. 248. Such appears to be the rule in Pennsylvania, *Mickley's Appeal*, 92 Penn. 514, and the same rule has been adopted in this court, *Quackenbos v. Kingsland*, 102 N. Y. 128; s. c., 55 Am. Rep. 771, and was recognized in *Vanderzee v. Slingerland*, 103 N. Y. 47;

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s. c., 57 Am. Rep. 701, before referred to. But in that case the learned judge writing the opinion (ANDREWS, J.), says that the rule established by the courts applies only when the context of the will is silent and affords no indication of intention, other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, and that indeed the tendency is to lay hold of slight circumstances in the will, to vary the construction and give effect to the language according to its natural import, and in the will which the learned judge was then construing, he found such indications. I think that similar indications exist in the will now before us. The testator does not charge the legacies upon his daughter Minnie personally, but upon the real estate devised, so they would be borne by whomsoever should become entitled to that real estate. He devises the real estate to her without words of inheritance. He then directs that in case she should die without issue, his estate, real and personal, should be possessed and enjoyed by the others named in the will. Her death without issue is a contingent event, but by adopting the construction contended for and claimed to be established by the authorities, the court would add another contingency not specified by the testator, that is, that she die without issue during the lifetime of the testator. As if to make his intentions clearer, and to indicate that no other contingency was contemplated than the one which he had expressed, the testator adds at the end of the clause, "the devise over to my husband, sister and brothers to depend upon the contingency of my daughter Minnie dying without issue." This repetition clearly defines the testatrix's intention, that in the event of her daughter's dying without issue, her husband, sister and brothers should enjoy the property, without reference to any other contingency. The daughter was an infant of about six years of age at the time of the death of the testatrix, and it would be a very forced construction of the language of the will to hold that the testatrix had an unexpressed intention that if the child should die the next year, or at any other time, after the death of the testatrix, the devise over to her husband, sister and brothers should not take effect.

Our conclusion is, that Minnie Van Zandt took under her mother's will a base or conditional fee, defeasible by her dying without leaving issue living at the time of her death. 1 Rev. Stat. 724, § 22. That her issue, should she leave any, would take by inheritance

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from her, but a conveyance by her in her life-time would be effectual as against them, and that an indefeasible title in fee could be conveyed and the contingent expectant estate limited to the husband, sister and brothers of the testatrix in the event of Minnie dying without issue, cut off by their joining with her in a conveyance. *Emmons v. Cairns*, 3 Barb. 243, 246 *et seq.*

For these reasons we think the order appealed from should be affirmed.

All concur.

Order affirmed.

PEOPLE V. ARENSBERG.

(106 N. Y. 128.)

Constitutional law — statute — oleomargarine.

SUFFICIENTLY reported, 57 Am. Rep. 746.

PEOPLE V. FITZGERALD.

(106 N. Y. 142.)

Criminal law — body-snatching — disinterment by authority of coroner.

On application of defendant, and on affidavits sufficient to give jurisdiction, a coroner directed the exhumation of a body for the purpose of a *post-mortem* examination to determine whether the deceased was murdered, and the body was accordingly exhumed and a public examination had without impanelling a jury. *Held*, not body-stealing.

CONVICTION of body-stealing. The facts, as stated in the dissenting opinion of HARDIN, J., in the court below, were as follows: General Irvine died in the city of San Francisco on the night of November 12, 1882, suddenly, having during the day been out gunning, returning to his home in the evening, after partaking of a light repast, consisting of tea, eggs, cold meat, and bread and butter, prepared by his wife Phœbe, who with their daughter, Mrs. Merkle, were occupying apartments together. Soon after partaking of the refreshments he became distressed and made complaints of internal pains. The daughter left for a physician, and upon returning, they found that death had taken place. The remains

were taken that night to the rooms of an undertaker and they were subsequently embalmed, and on the fourth of December were conveyed by the widow and daughter to the city of Elmira, where they were interred in Woodlawn Cemetery.

About a year after the death inquiry was instituted as to the cause thereof, and the defendant employed a detective named Nealson, who visited the city of Elmira, and returned to San Francisco and made a report to the defendant, who then applied to the undertaker who embalmed the body, and to Dr. Wooster, the deceased's intimate friend and physician, who had viewed the body, and they gave affidavits of certain facts within their knowledge.

In the affidavit of Dr. Wooster, subscribed March 11, 1885, in connection with the statement of facts he adds, "In my opinion he was first poisoned in his food or drink and then when in agony from the effects of the dose he was struck on the head to stop his contortions and groans."

Porter, the undertaker, stated in the affidavit subscribed by him, the condition of the remains when he received them, and that sundry persons viewed the remains, "among others, Dr. Wooster, who remarked that to him it looked as having been poisoned."

With these papers in her possession, the defendant visited the city of Elmira, where she met the detective, Nealson. She sought legal counsel as to the method to be pursued in order to investigate whether General Irvine died a natural or unnatural death. She consulted an attorney, who advised her that the coroner of the county of Chemung had jurisdiction to hold an inquest over the remains and that the "papers upon their face authorized him (the coroner) or were sufficient, upon which he might exercise his discretion in the matter."

The defendant and Nealson visited the office of Dr. Reilly, the coroner of the county of Chemung, and held a conversation in regard to the circumstances attending the death of the deceased. The affidavits of Porter and Dr. Wooster were presented to the coroner and the defendant asked Dr. Reilly "to do his duty as coroner; to examine and see if the proofs were sufficient to authorize him in proceeding," and "that she wished the body to be taken up and the stomach or some part of it to be analyzed to see if there was any trace of poison there. She made the request that the evidence should be produced if it was there."

After that interview Coroner Reilly determined to proceed on the premises. He visited Nathan Baker, superintendent of Woodlawn

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cemetery, at his house and said to him, "That he had evidence to satisfy him that a wrong had been perpetrated, or sufficient to warrant him in making an examination of the body of General Irvine. * * * That he had sufficient grounds of acting and he asked Baker, the superintendent, to act," showing him one of the affidavits and stating that he had others. Thereupon the superintendent determined to act in the premises and facilitate the proceedings in behalf of the coroner. Thereupon directions were given Abbott, the sexton, to open the grave and remove the remains to the vault in the cemetery for the purpose of an examination.

Reilly, the coroner, also applied to Dr. Wey to become one of two physicians to make the examination, and on the evening of the eighth of April Reilly visited the office of Wey with Nealson, avowing that he had full authority in the premises "to conduct an examination and have an examination made by the physicians." The hour was fixed for an examination at ten the next morning and Reilly informed Wey that he would "notify Dr. Squires * * * and we might expect to meet at the receiving vault in Woodlawn cemetery" at ten the next morning. Accordingly they met the next morning at the receiving vault in Woodlawn cemetery, where the physicians found Coroner Reilly and Nealson and Baker and Abbott. The body was found "lying in a coffin or casket on the floor of the receiving vault. The coroner made a minute of the nature of the covering of the coffin and its handles and the plate and the descriptions of every other matter connected therewith. Drs. Wey and Squires raised the head and shoulders of the body and after carefully scrutinizing the face and the coroner making a minute thereof, a careful examination was made of the head, and the stomach and duodenum, and certain other parts of the body were removed and delivered to Dr. Reilly, who placed them in a vessel he had prepared for that purpose.

After the examination the coroner went over to the house of Abbott, the sexton, in the cemetery grounds, where Baker suggested the propriety of having a coroner's jury and Wey replied: "It is too late for such a proceeding."

Baker testified that he was present at the request of the coroner to identify the remains, and that he did so identify them, and that he was sworn upon that point by the coroner; that while at the vault he had a conversation with Dr. Reilly, the coroner, and he adds: "Dr. Reilly and myself conversed for a few minutes about

having a jury, and I said to Dr. Reilly there was enough within the bounds of the cemetery to make up a jury, and he asked if I would have them all come to the house, and I so ordered, and they came. I think there were five men that came off the cemetery. I think there were nine men there then. When I had sent for the men I went back to the house and did not go in the vault again. About that time Dr. Wey came over to the house."

He also testified that he held a conversation with Dr. Wey and stated as follows: "Dr. Reilly has seemed to think it advisable to have a jury. There are men enough here to have a jury without delaying, and there are men enough; they are already here; and Dr. Wey said it was of no use; that if there was any thing found to show that this man died from any cause other than natural causes the whole procedure would have to go to California, and this jury would never be heard of again. I stepped out of doors and Reilly was coming over from the vault, and he had not yet come in the house; and I said Dr. Wey thinks it is entirely useless to have a jury, and I don't wish to urge this matter one way or the other, doctor; and Dr. Wey came out and he repeated to Dr. Reilly what he had said to me in the house, that it was no use to have a jury, and gave his reasons as I have stated."

No jury was, in fact, sworn to hold an inquest. The remains were recoffined and returned to the grave, except the parts removed therefrom as already stated.

Jacob Schwartz, for appellant.

John B. Stanchfield, for respondent.

RAPALLO, J. The facts of this extraordinary case are fully stated in the dissenting opinion of HARDIN, J., at General Term. We should content ourselves with concurring in that opinion, were it not that it simply orders a new trial for errors in the charge, for refusals to charge, while we think that it should have gone farther and have held that the facts of the case did not establish a crime punishable under the statute against body-stealing (Penal Code, § 311), under which the prisoner was indicted and convicted, and which is in the following words: "Sec. 311. A person who removes the dead body of a human being, or any part thereof, from a grave, vault or other place where the same has been buried, or from a

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place where the same has been deposited while awaiting burial, without authority of law, with intent to steal the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years, or by a fine not exceeding one thousand dollars, or both."

This statute describes every kind of "body-stealing" known to the law. The addition inserted in the Penal Code, "or for the purpose of obtaining a reward for the same," was the only substantial change made since the Revised Statutes, in the definition of this heinous crime.

The intent of the statute is manifest. It certainly was not intended to apply to exhumations made by legally constituted public authorities for the purpose of ascertaining whether crime has been committed in producing the death of the person whose body is exhumed. When the exhumation is made, not secretly but publicly, on open application to the officer of justice charged with the duty of inquiring into the cause of death of any person whose body is brought within his jurisdiction, it is a total misapplication of the statute against body-stealing to use it for the purpose of imposing its punishment on all persons concerned in the exhumation, in case any proceedings of the officer, under whose direction it was made, should be found to be irregular.

The irregularity alleged in this case in the conduct of the coroner is that he did not impanel a jury before he ordered the *post mortem* examination to be made by the physicians whom he summoned for the purpose. A sufficient number of persons to form a jury was assembled by direction of the coroner, but the jury was not drawn and impanelled. I refer to the opinion of Judge HARBIN as correctly stating the facts, which we have verified by an examination of the testimony.

The point of law is debatable whether a *post mortem* should take place before the coroner has impanelled a jury. But it is settled that the *post mortem* should not be in the presence of the jury, and that they are to be instructed by the testimony of the physicians who are designated by the coroner to make it. The dissection by order of the coroner is expressly authorized. Penal Code, § 308; *Crisfield v. Perins*, 15 Hun, 202; affirmed, 81 N. Y. 622.

If as in England at one time, the findings of the coroner's jury were to stand as an indictment by a grand jury, some point might

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be made on behalf of the accused, as to the validity of the inquest in such a case as this. But to resort to those questions for the purpose of supporting an indictment for body-stealing, under the circumstances of this case, is quite unreasonable. In the present case the defendant communicated to the coroner, in the form of affidavits, whether legally authenticated or not is immaterial, information which should have induced any magistrate, not neglectful of his duty, to believe that he ought to investigate the matter presented to him. Those affidavits made a strong case to lead the coroner to believe that a murder had been committed, and that an examination of the body, which was within his jurisdiction, would disclose the fact. The defendant sought an examination of the body. She asked the coroner to do his duty, and to examine the body. Whatever motives may have influenced her, no one can suppose that, however unfounded her belief might have been, there was not sufficient in the papers she presented to the coroner to justify his action, and there is no pretense that the affidavit of Dr. Wooster, which she produced, had been in any manner influenced by her. Her silence during several years after the death of Gen. Irvine is the main argument against the *bona fides* of her charge, and it is said that her desire was not so much the punishment of crime, as to obtain some pecuniary advantage for herself by making defamatory charges. However this may be, if she committed a wrong, it was not the crime of body-stealing, and on this ground the conviction, and the judgment of the General Term affirming it, should be reversed and the prisoner discharged.

All concur.

Judgment reversed.

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(105 N. Y. 171.)

Assignment for creditors — authority to compromise — to sell on credit.

An assignment for the benefit of creditors is not invalidated by giving the assignee authority to compound or compromise debts owing to the assignor.* Authority to the assignee to execute bills of sales or other conveyances, "for such consideration in money or other things" as he should deem sufficient, is not an authority to exchange or sell on credit.

* See *McConnell v. Sherwood* (84 N. Y. 522), 38 Am. Rep. 537.

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ACTION for conversion. The opinion states the points. The defendant had judgment below.

Edwin B. Smith, for appellant.

Charles F. MacLean, for respondent.

ANDREWS, J. The trial judge directed a verdict for the defendant on the ground that the assignment of February 3, 1881, made by Dart, one of the firm of Swezey & Dart, to the plaintiff, was void, as having been made with intent to hinder, delay and defraud creditors. The assignment in form was a general assignment for the benefit of the creditors of the firm of Swezey & Dart and the individual creditors of Dart, and was executed by Dart in the firm name and also as an individual. It purported to transfer and assign to the plaintiff all the property of the firm, "real, personal and mixed, not exempt from attachment by law," for the benefit of the firm creditors, and also the individual property of Dart for the benefit of his individual creditors. The General Term affirmed the judgment, and the sole point now presented is whether the question of fraud should have been submitted to the jury.

In support of the judgment it is claimed that the assignment was void on its face, but it is also insisted that the evidence of fraud, extrinsic to the instrument, was so conclusive that the court was justified in withholding the case from the jury, and in ruling as matter of law, that fraud in fact was established. The provisions in the instrument of assignment upon which the defendant relies to establish its validity relate to the powers conferred upon the assignee, *first*, "to compound, compromise and release" debts owing to the assignor, and *second*, to "execute, acknowledge and deliver in the name of the said parties of the first part (assignors), as such copartners, or in the name of the said Joseph Dart, individually for such consideration, in money or other thing as he may deem sufficient, all such deeds, bills of sale or other conveyances in writing, under seal or otherwise, and all such releases, contracts and other instruments in writing or under seal as in his discretion may from time to time be necessary to carry into effect the intent and purpose of this instrument." The validity of a provision in a general assignment for the benefit of creditors, authorizing the assignee to compound or compromise debts owing to the assignor

has been recently affirmed in this court, and is no longer an open question. *Coyne v. Weaver*, 84 N. Y. 386. The stress of the argument against the validity of the instrument of assignment is placed on the clause conferring upon the assignee the power to execute deeds, bills of sale, or other conveyances in writing "for such consideration in money or other thing" as he may deem sufficient. This clause, it is insisted, authorizes the assignee to sell or dispose of the assigned property upon credit, or upon any consideration, whether in money or property. If this is the true construction of the provision, there can be no doubt of its invalidity. The law justifies and upholds trusts created by insolvent debtors of their property, through general assignments for the benefit of their creditors, only when they provide for the immediate and unconditional surrender and application of the assigned property to the payment of their debts, and any attempt to confer upon the assignee the power to delay the collection and conversion of the assets into money, is held to be unlawful and to vitiate the assignment. It has therefore been held that an authority contained in the assignment to sell the assigned property on "credit," or for "cash or upon credit" as in the judgment of the assignee may appear best, or to convert the property into "money or available means" renders the assignment fraudulent and void. *Nicholson v. Leavitt*, 6 N. Y. 510; s. c., 57 Am. Dec. 499; *Burdick v. Post*, 6 N. Y. 532; *Brigham v. Tillinghast*, 13 N. Y. 215. Construing the clause in question in view of the general rule of construction of written instruments, that a construction will be preferred which will uphold rather than one which will destroy them (a rule applicable as well to insolvent assignments as to other instruments), and the further rule, that in construing a particular clause the whole context may be considered, we are of opinion that the clause in question should not be deemed to confer authority to sell the assigned property on credit, or to exchange it for other property. The language of the whole paragraph seems more appropriate to a mere power of attorney than to an instrument of transfer or conveyance. It authorizes the assignee to execute deeds, bills of sale, etc., "in the name of the parties of the first part" (the assignors), a power which they would very rarely, if ever, find it necessary to exercise. But the power is in express terms limited to instruments which the assignee may deem necessary or requisite "to carry into effect the intent and purpose of this instrument." Looking at the preceding

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parts of the assignment it is found that the granting clause is followed by a declaration of the trusts upon which the assignee is to take the property, the first of which is, "to take possession of and sell the same at public or private sale, and to convert the same into money," and next to "apply the proceeds thereof," after deducting necessary costs, charges and expenses, to the payment of the debts of the assignors, in the order specified. This explicit authority and direction to sell the assigned property and convert the same into money cannot be reconciled with the subsequent power to execute in the names of the assignors, deeds, bills of sale and other conveyances "for such consideration in money or other thing" as the assignee may deem sufficient, provided the latter clause, as is claimed by the defendant, authorizes the assignee to dispose of the assigned property on credit, or to exchange it. But we are of opinion that this supposed inconsistency does not in fact exist. It is not difficult to imagine cases where in the adjustment of property interests held in common by the assignors and third persons, mutual releases and transfers might become necessary, setting apart in severalty to each owner his interest in common property, or where in the process of conversion it might become necessary for the assignee to execute instruments, upon a consideration other than the payment of money, affecting the assigned estate, but not involving any sale or exchange. It is not improbable that the draughtsman inserted this clause without any very definite purpose, following some precedent. But however this may be, the provision is quite too vague to overcome the explicit direction in the prior clause, requiring, in substance, that the property should be sold for money, and especially in view of the expressed purpose of the latter clause, that the power thereby given was "to carry into effect the intent and purpose" of the instrument.

[Omitting questions of fact.]

The judgment should be reversed and a new trial ordered.

Judgment reversed and new trial ordered.

All concur.

TAYLOR V. CITY OF YONKERS.

(186 N. Y. 228.)

Municipal corporation — negligence — icy sidewalk.

A city is not bound to remove, or sprinkle with ashes or sand, ice formed upon a sidewalk by severe cold suddenly following a fall of rain or the melting of snow,* and is not liable for an injury to a person falling thereon, in the absence of evidence connecting the injury with some structural defect.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Joseph F. Daly, for appellant.

John F. Brennan, for respondent.

FINCH, J. This case was submitted to the jury under instructions that a municipal corporation is bound to keep its sidewalks safe and convenient for the passage of the public so far as reasonable diligence and the possession of adequate resources will allow; and the application of this rule to conditions resulting from the rigors and changes of a northern winter, and to two emergencies which frequently occur, was very fairly and justly discussed and limited. It often happens that in a single day or night every street and sidewalk in a city or village is covered with a heavy fall of snow. It is not expected and cannot be required that the corporation shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens. Each can promptly and without unreasonable burden clean the snow from his own premises, and the authorities may justly and lawfully require that to be done under the jurisdiction conferred by their charters. But though the municipality makes the necessary regulation it is not thereby relieved from responsibility. The duty remains, and it must therefore see to it that its ordinance is obeyed. It is entitled however to a reasonable time within which to perform the duty in the manner permitted, and is not guilty of negligence, if observing that the work is

* See *Grossenbach v. City of Milwaukee* (65 Wis. 81), 56 Am. Rep. 614.

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being generally done, it awaits for a reasonable period the action of the citizens. But when such reasonable time has been given, the corporation must compel the adjoining owners or occupants to act, or do the work itself, and if it suffers the obstruction to remain thereafter, with notice, actual or constructive, of its existence, it may become responsible for injuries resulting. Another and different emergency sometimes occurs and was referred to in the charge to the jury. When the streets have been wholly or partially cleaned it often happens that a fall of rain or the melting of adjoining snow is suddenly followed by severe cold which covers every thing with a film or layer of ice and makes the walks slippery and dangerous. This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result. It may and should require householders, when the danger is great, to sprinkle upon the surface ashes or sand or the like, as a measure of prudence and precaution, but it is not responsible for their omission. It is no more bound to put upon the ice, which it cannot reasonably remove, such foreign material than to cover it with boards. The emergency is one which is common to every street in the village or city, and which the corporation is powerless to combat. Usually it lasts but a few days and the corporate authorities may await without negligence a change of temperature which will remove the danger.

Both of these emergencies are shown to have existed in the present case, and as to both the learned trial judge gave to the defendant the full benefit of the rule as we have stated it. But there were further facts. The sidewalk along Buena Vista avenue, where it passed an unoccupied lot, was bounded on its inner line by an unprotected bank of earth. For two years the action of rain and frost had thrown upon the walk sand and gravel and stones from the bank, until the flagging was entirely covered by it, and a new and sloping grade substituted for the one adopted. The sand on the inner line was about eight inches in depth, growing less toward the curb where it was about one inch. Mixed in with this were stones, some of which were as large as apples. When the winter came this walk was covered with snow which was never removed. Before the accident the snowfall had been heavy, but it was evidently not recent, for upon this walk it had been trampled down by travel, and by freezing and thawing converted into ice. These facts tended to establish negligence on the part of the city. If the slope of the

walk was not dangerous in the summer weather, it might become so when coated with ice in the winter, and those having the care of the highway were very blind if they did not foresee the possible danger. No one however appears to have been injured by it when simply in this condition, for the reason probably that sand was continually washed upon it from the adjoining bank. But this protection disappeared before the plaintiff was injured. On the night preceding, rain fell which washed the sand from the ice, and then froze, covering every thing with a new surface, and making the whole city slippery and dangerous for travel. That was just as true of walks cleaned, and it may even be the fact that the latter, when paved, became by reason of their smoothness, the most dangerous of all. That such was the situation was very strongly shown by the conduct of the plaintiff himself. He boarded in a house adjoining the vacant lot of which we have spoken, and standing so far above the grade of the street that ten steps led down to the sidewalk in front. On coming out in the morning with a companion and observing the situation he hesitated to come down his own steps to the sidewalk, although clear of snow as we may fairly assume, and chose rather, as a measure of safety, to take another route. He went through the picket fence at the side, and on to the vacant lot which was covered with snow, and thence down to the sidewalk which he essayed to cross, intending to go to his work through the middle of the street and on the roadway. His conduct pictures the situation perfectly. He stepped on the new ice surface, just formed, and for the existence of which the city was in no respect responsible. Had that been the whole of the case a recovery would have been impossible. But this new ice formed on a slope, having a fall toward the curb of six or seven inches in ten feet, which the city had negligently suffered to remain. If that slope was one concurring cause of the fall without which the accident would not have happened, the city is liable. We have stated the rule to be that "When two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate, the one being a culpable defect in a highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained, but for such defect. *Ring v. City of Cohoes*, 77 N. Y. 83, 88; s. c., 33 Am. Rep. 574. Now the jury were plainly charged that the new ice recently formed furnished no ground of negligence on the part of the city,

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and it necessarily followed that the jury found the slope of the walk to have been a concurrent cause without which the accident would not have happened. The only remaining inquiry is whether there were any facts which permitted that inference, or whether there were none, and the conclusion was mere guess and speculation. The fact proved was that the plaintiff slipped on the new ice lying on a slope. The inference, it is claimed, is natural and logical and sustained by common observation and experience that both of the conditions entered into the accident as proximate causes. But no one can say that if the new ice had spread over level the plaintiff would not have fallen, and there is nothing in the case pointing to the slope as a concurrent cause beyond the bare fact that it existed, and so nothing to redeem the inference sought from the domain of mere guess and speculation. The question involved has been quite earnestly debated in other States where it arose under statutes requiring towns to keep the streets safe and convenient. In Maine and Massachusetts it is held, that if besides the defects in the way, there is also another proximate cause of the injury contributing directly to the result, for which neither of the parties is in fault, the town is not liable. *Moore v. Abbott*, 32 Me. 46; *Moulton v. Sanford*, 51 Me. 127; *Marble v. Worcester*, 4 Gray, 395; *Billings v. Worcester*, 102 Mass. 329; s. c., 3 Am. Rep. 460. These rulings are based largely upon two grounds: that the town is liable for the defect alone, and that the proportion of injury due to that cause is impossible to be ascertained. A contrary rule is held in Vermont and New Hampshire. *Hunt v. Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197. We have already stated the rule to be in this State that the defect, even when a concurring cause, must be such that without its operation the accident would not have happened. Where the defect is the sole explanation of the injury there is no difficulty; but where there is also another, for which no one is responsible, we have held that "the plaintiff must fail if his evidence does not show that the damage was produced by the former cause." *Searles v. Manhattan R. Co.*, 101 N. Y. 661. And we added that he must fail also if it is just as probable that the injury came from one cause as the other, because he is bound to make out his case by a preponderance of evidence, and the jury must not be left to a mere conjecture or to act upon a bare possibility. In this case that rule was violated. The plaintiff slipped upon the ice. That by itself was a sufficient, certain and operating

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cause of the fall. No other explanation is needed to account for what happened. It is possible that the slope of the walk had something to do with it. It is equally possible that it did not. There is not a particle of proof that it did. To affirm it is a pure guess and an absolute speculation. Are we to send it to a jury for them to imagine what might have been? The great balance of probability is that the ice was the efficient cause; there is no probability not wholly speculative that the slope was also such. Its descent was slight, not quite an inch in a foot, and not more than constantly occurs in the streets of a city. No knowledge or intelligence can determine or ascertain that such a slope had any part or share in the injury, and to send the question to the jury is simply to let them guess at it, and then upon that guess to sustain a verdict for damages. I am quite willing to hold cities and villages to a reasonable performance of duty; but I am not willing to make them 'practically insurers by founding their liability upon mere possibilities. For these reasons I think the plaintiff should fail and the motion for a nonsuit should have been granted.

The judgment should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur except ANDREWS, J., not voting.

WILES LAUNDERING COMPANY V. HAHLO.

(105 N. Y. 284.)

Contract — to launder and return goods — lien — payment.

Plaintiff contracted with H. to launder all the collars and cuffs manufactured by the latter, at a price specified; to return the goods as fast as laundered and to render a bill and receive payment in cash on the first of each month for all goods laundered and returned. *Held*, that plaintiff had no right of lien either for the balance due him or for the work done on the goods in his hands.

ACTION for wrongful levy. The opinion states the case. The plaintiff had judgment below.

Blumenstiel & Hirsch for appellant.

N. Davenport, for respondent.

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RAPALLO, J. No controverted question of fact arose upon the trial of this action. Only one witness was examined on the part of the plaintiff, and no testimony was introduced on the part of the defense. The question presented was purely one of law.

The action was brought against the sheriff and the defendant, Hahlo, for having under an execution in favor of Hahlo against one Hoexter, taken from the possession of the plaintiff a quantity of collars and cuffs which had been delivered to the plaintiff by Hoexter for the purpose of being laundered, and upon which the plaintiff claimed to have a lien to the amount of \$1,747.72, being the general balance due the plaintiff for laundering the collars and cuffs so taken from it by the sheriff, and also for laundering other collars and cuffs which had been received by it from Hoexter and returned to him before the levy in question. The only question at issue is whether the plaintiff had the lien which it claimed.

The uncontroverted facts were as follows: Hoexter was a manufacturer of collars and cuffs, and the plaintiff carried on the business of laundering for manufacturers. In June, 1884, Hoexter, through his representative, Mr. Kupfer, stated to the agent of the plaintiff that he was about manufacturing a superior line of goods, on which he desired to have the laundry work of the plaintiff, and asked the plaintiff's agent whether the plaintiff could take the job, and the agent replied that the plaintiff could. An agreement was thereupon entered into, verbally, between them that the plaintiff should do the laundry work on all collars and cuffs Hoexter should deliver to the plaintiff, at the price of sixteen and one-half cents per dozen, payable in cash as follows: That on the first of each month the plaintiff should render a bill for all goods laundered and returned to Hoexter, during the preceding month, and should receive payment in cash. That cash was not to be paid at the time the goods were actually delivered to Hoexter, but cash on the first of each month, for goods returned the previous month. That there was no fixed period during which the goods were to be delivered to be laundered, but only until notice by either party. That the plaintiff might at any time refuse to do any more goods, and Hoexter might refuse to deliver any fresh goods if he chose, and whenever Hoexter should desire a general settlement and cleaning out of the goods, he should shut down for ten days and not send any more work, and give the plaintiff a chance to get every thing out of the laundry. It usually took seven or eight days to complete the pro-

cess of laundering the goods. Under this agreement Hoexter began sending goods to the plaintiff's laundry about the 18th of June, 1884, and the business continued until the 6th of April, 1885, when it was discontinued on account of the failure of Hoexter.

The work done by the plaintiff during the continuance of the contract amounted to between \$6,000 and \$7,000. In the course of the business, goods were generally delivered at the laundry, and laundered goods returned, every day. The stipulated monthly payments were, at first, made by sight drafts drawn by Kupfer on Hoexter. This continued until January, 1885, when a sight draft was given for the December account. After January the plaintiff received ten-day drafts for the work of the preceding month, down to the close. On the 3d of April, 1885, the plaintiff received for the March account a ten-day draft drawn by Kupfer on Hoexter for the sum of \$1,132.41. Hoexter refused to accept this draft, and it was returned protested, and was never paid, and on the 6th of April, 1885, there was a balance unpaid to the plaintiff for work, including this protested draft of \$1,747.72, and the plaintiff had on hand between 2,400 and 2,500 dozen cuffs and collars of Hoexter's, which were taken by the sheriff on the execution against Hoexter, on the 25th of April, 1885, against the protest of the plaintiff's agent, who claimed a lien thereon for the above-mentioned balance of \$1,747.72 due plaintiff. It was admitted on the trial that the value of the goods taken was equal, at least, to the plaintiff's claim of \$1,747.72, and it was also admitted by the plaintiff's counsel that when the defendants took the goods they tendered the amount due for the work done upon the particular goods which are the subject of this action.

At the close of the testimony, the defendant's counsel moved for a nonsuit on the ground that it appeared that there was no lien on the goods, and also on the ground that there was no lien upon the goods taken, for work done on other goods which had already been delivered. The court denied the motion, and no evidence being offered on the part of the defense, the plaintiff's counsel asked the court to direct the jury to render a verdict for the plaintiff for the full amount. The court stated that it had great doubt as to the existence of any lien at all, but that the case was important enough to go to the General Term, and accordingly directed a verdict. To these rulings exceptions were duly taken. Judgment was entered on the verdict, and on appeal to the General Term the judgment was affirmed.

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If under the agreement between the plaintiff and Hoexter, the plaintiff acquired any lien upon the goods laundered, we think that this lien attached to any goods which the plaintiff had in its possession at the close of the dealings, and to the extent of the whole balance then due to the plaintiff for work done, as well upon the particular goods remaining in the plaintiff's possession, as upon those which it had previously returned to Hoexter. All the work was done under a single contract, and the lien attached to all goods delivered to the plaintiff under that contract. By returning a portion of those goods to Hoexter, the plaintiff waived only its lien upon the goods so returned, retaining it for its full amount upon the residue which remained in its possession. This consequence results from the entirety of the contract under which the goods were delivered to the plaintiff to be laundered. If each lot of goods had been delivered to the plaintiff under a separate contract, it would have acquired only a lien upon the particular lot of goods so delivered, and only for the work done on that particular lot of goods, and when that lot was returned to the manufacturer, the plaintiff, by parting with possession, would have destroyed its lien on that lot of goods, and could not transfer it to any other lot received under a separate contract. But where property is delivered for the purpose of having work done thereon, which adds to its value, it makes no difference that the deliveries take place at different times, provided they are all made under a single contract. The lien attaches to all the property, in the same manner as if it had all been delivered at one time, and if part of it is voluntarily returned without payment for the work, the only consequence is that the person doing the work has abandoned a part of his security for the total amount due him, and retained his lien therefor only upon the property which remains in his possession. This is the doctrine recognized in *Morgan v. Congdon*, 4 N. Y. 552, where logs were delivered at the defendant's saw-mill on different days, upon an agreement that defendant would saw into boards all the logs delivered. The defendant sawed part of them and delivered the boards, without being paid for the sawing, and it was held that he had a lien upon the logs undelivered, for the sawing of the others, provided all the logs were delivered to the defendant under a single contract. To the same effect are the cases of *Blake v. Nicholson*, 2 Maule & Sel. 168, and *Chase v. Westmore*, 5 Maule & Sel. 180, and other cases. In the case last cited, meal was delivered at a mill at various times to be

ground, under a single contract to grind all the meal furnished, at a fixed price, no time or mode of payment being agreed upon, and it was held that after delivery of a part of the meal ground, the grinder could retain the residue for the whole balance due him.

But all these cases are subject to the condition that there is nothing in the contract for doing the work, inconsistent with the right of lien, and that where a particular future time of payment is fixed, which may be subsequent to the time when the owner is entitled to a return of the article upon which the work is done, there can be no lien, and that where the parties contract for a particular time or mode of payment the workman would have no right to set up a right to possession, inconsistent with the terms of his contract, and in such a case there is no lien. 5 Maule & Sel. 186, 187.

In the present case the legal effect of the contract was that the collars and cuffs should be returned to Hoexter as fast as laundered. On this construction the parties acted throughout their dealings. Laundered goods were returned, as a general rule, every day during each month. The plaintiff had no right to demand pay for each lot delivered at the time of delivery. The only witness to the contract testifies expressly that such was not the agreement, but on the contrary that it was, that on the first of each month Hoexter should pay for the goods which had been laundered and returned during the preceding month. It is clear that the return of the goods to Hoexter was to precede the right to demand payment for the work, by a longer or shorter period, according to circumstances, but certainly some period of time. This is entirely inconsistent with the theory of a lien, as has often been adjudged. The case of *Stoddard Woollen Manufacturing Company v. Huntley*, 8 N. H. 441; s. c., 31 Am. Dec. 198, is in point. It was an action of trover against a clothier for converting 1,000 yards of flannels which he had dressed for the plaintiff, and the defendant set up a lien for the price of his work. The work had been done under an agreement between plaintiff and defendant that the defendant should dress what flannels the plaintiff should make during the year, and finish them as fast as manufactured, and bale them, the plaintiff to pay for finishing once in three months. Under this agreement flannels had been dressed by the defendant and returned to the plaintiff for about six months, and at the end of one of the quarters the defendant had on hand two bales for the work on which he had not been paid. The plaintiff, through its agent,

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demanding these bales and the defendant refused to deliver them without being paid for the dressing. The court held that the legal effect of the contract was that the flannels were to be delivered to the plaintiff as fast as dressed, and that the dressing was not to be paid for until the end of the quarter; that by such a contract the right of lien was waived, and that even if some of the cloth remained in the defendant's hands at the end of the quarter he was not entitled to retain it for the price of dressing. The only difference between that case and the present one is that there the work was to be paid for quarterly, and here it was to be paid for monthly.

There are many cases illustrating the same principle. Where it is agreed that a credit is to be given for the price of the work, not limited to a period preceding the time for the return of the article, the contract is inconsistent with the right of lien, and none can be set up. This rule has been applied even where the party for whom the work was done has become insolvent between the time of the employment and the expiration of the time of credit agreed upon. *Felding v. Mills*, 2 Bosw. 489. The same principle is applicable to liens of warehousemen, carriers and other bailees. If by the terms of the contract, possession of the property is to be surrendered before payment, no right of lien exists. In *Chandler v. Belden*, 18 Johns. 157, 162; s. c., 9 Am. Dec. 193, it was held that where, by the terms of the contract, freight was not to be paid until after the delivery of the goods, the carrier could not claim a lien. The present respondent cites the case of *The Kimball*, 3 Wall. 37, but on looking beyond the head-note, into the opinion of Mr. Justice FIELD, it is certainly not an authority in favor of the respondent. There by the terms of the charter-party part of the freight was to be paid in advance. The cargo was to be delivered within reach of the ship's tackle, and the balance of the charter money was to be payable, one-half in five days, and the other half within ten days, after the discharge of the cargo. The opinion rests upon the ground that the provision as to delivery within reach of the ship's tackle, related only to the manner of discharging, and that the credit was given only for a few days after the discharge of the cargo, and that it was no more than a reasonable time to enable the freighters to examine the condition of the goods, and determine whether he would accept them, and was not inconsistent with the retention of their possession by the ship-owner until the charter-money should be paid, distinguishing the case in this respect from *Foster v. Colby*, 3 Hurl. & N. 705.

It is needless to multiply authorities on this point, though many might be cited. The counsel for the respondent contends that the contract being an entire one, no pay for the work done by plaintiff would become due till the termination of the contract, except for the agreement to make monthly payments, and that these payments were merely advances on account of the entire payment, and that an agreement to make these advances could not be considered as giving credit to the owner of the goods, but rather a credit to the mechanic.

We cannot agree to this construction of the contract. The payments were not advances on account, but payments in full for the work done on goods returned during the month preceding the payment. But assuming the construction contended for, we are unable to see how it helps the plaintiff's case. The counsel concedes, in his points, that it was unquestionably understood that Hoexter was at liberty to take the goods as fast as they were laundered, because the nature of his business probably required it. If the contract price of the work was not due until the end of the contract, but the goods were to be delivered in the meantime, we fail to perceive how the contract was consistent with a right to a lien on the goods for that contract price.

We think that the doubt of the learned trial judge as to the existence of any lien at all, was well founded, and that the judgment should be reversed and a new trial ordered costs to abide the event.

Judgment reversed.

All concur, except PECKHAM, J., not sitting.

SMITH v. CLEWS.

(105 N. Y. 283.)

Agency—broker—power to sell.

M. was a broker who procured diamonds from larger dealers to sell to his customers. He procured from plaintiffs, dealers in diamonds, some diamonds for a customer, giving a receipt stating that they were received by him on approval to show to his customer, and to be returned to plaintiff "on demand." The defendant purchased them from M. in good faith, supposing him the owner. He had previously purchased from M. and paid him for two other lots of diamonds obtained by M. from the plaintiff in the same way. *Held*, that defendant got good title to the diamonds.

ACTION to recover personal property. The opinion states the case. The plaintiff had judgment below.

Albert A. Abbott, for appellant.

Chas. H. Woodbury, for respondent.

PECKHAM, J. This is an action under the Code to obtain the delivery of personal property alleged to belong to plaintiffs and to be wrongfully withheld by defendant. The plaintiffs had a verdict which was affirmed at General Term and the defendant has appealed here. The plaintiffs claimed to be the owners of what they called a pair of diamond ear-knobs, of the value of \$1,400, which came into the possession of defendant, as shown by the evidence, in the following manner.

Elijah Miers was a dealer in diamonds in New York. His business was to procure diamonds from the larger dealers and sell them to his customers. Before the 13th of January, 1879, he had procured from an authorized agent of the plaintiffs, a pair of diamond ear-rings which on that day he had sold to the defendant, for \$300, and had received the check of defendant, payable to his order in payment therefor. Before the 23d day of January, 1879, Miers had procured another pair of ear-rings from plaintiffs' said agent, and sold them on that day to defendant for \$450, receiving in payment the first pair of ear-rings and the check of defendant, for the balance of \$150. Miers paid to plaintiffs' agent the price of these diamonds after the sale to defendant. The defendant had purchased them in good faith from Miers assuming him to be the owner. He intended the first pair as a present for his wife, but when shown to her she preferred a more expensive pair, and hence the second purchase. These also proved unacceptable, and it was some time after their purchase by defendant before the diamonds in question were presented to him for purchase, he having in the mean time kept the second pair, and upon the purchase of the diamonds in question of the same man Miers, he gave back the second pair and paid \$650 in addition, thus making up \$1,100, the purchase-price of these last diamonds.

There is no question of the *bona fides* of the series of purchases by the defendant. The evidence is uncontradicted as to the manner in which Miers obtained the last diamonds from the plaintiffs.

They had delivered them to Plumb, the diamond broker, who had delivered the other diamonds to Miers. One of the plaintiffs was asked how it happened that he delivered these diamonds to Plumb, and he testified that he could not say whether it was at Miers' request or not, but that Miers had called on him before he delivered them to Plumb and had said to him that he had a customer for a pair of diamond ear-knobs, and although the plaintiff could not say that he told Miers that he would send him the diamonds through Plumb, yet he says he stated to Plumb that he would do so, and he did do so, and he authorized Plumb to deliver the diamonds to Miers and that that is the way Miers got them. The witness also said he knew Miers had the diamonds in his possession immediately, that they were taken from the plaintiffs' office and delivered to Miers by Plumb; they were delivered to Plumb on the 12th of April, and by him to Miers on that day. When Plumb delivered them to Miers he took from him a receipt in this form:

"NEW YORK, April 12, 1879.

"Received from Alfred H. Smith & Co. by their representative, B. W. Plumb, a pair of single stone diamond ear-rings 10½ carats, of the value of fourteen hundred dollars, on approval to show to my customers, said knobs to be returned to said A. H. Smith & Co. on demand.

"E. MIERS."

Having thus become possessed of the diamonds, Miers, as has been stated, sold them to defendant, and the question is, did he get a good title as against the plaintiffs?

Taking the undisputed evidence and reading this receipt in the light thereof, we cannot resist the conclusion that the plaintiffs conferred upon Miers the power to sell these diamonds and of course to give a good title, and therefore the court should have directed a verdict for the defendant.

The plaintiffs were dealers in diamonds and they knew Miers and that he was engaged in the business of a diamond dealer — a seller of the stones to whomever he chose.

They had on two former occasions intrusted, through their agent, diamonds to Miers, who had sold them and accounted for the proceeds of the sale without any fault being found so far as appears on account of any lack of authority to sell.

They were informed by Miers on this particular occasion, that he had a customer for a pair of diamond ear-rings and these diamonds

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were then intrusted to Miers by the plaintiffs, through their agent, Plumb. Upon taking them Miers gave the receipt spoken of. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds, show them to his customer, and if approved of by the customer, sell them to him? The fact that Miers agreed to return them to plaintiffs on demand must be construed with reference to the obvious purpose for which the diamonds were intrusted to him, viz., that of a sale, and so construed, the plain meaning is that if not already sold, the plaintiffs had the right to demand a return of the diamonds any time and Miers would then be bound to return them. The information given to plaintiffs, by Miers, that he (Miers) had a customer for a pair of diamond ear-knobs, is susceptible of no other interpretation than that he had a customer who wanted to buy a pair. Under such circumstances what could a dealer in diamonds mean by intrusting them to another dealer who had a customer who wanted to buy them, and who came to this dealer for the purpose of being supplied by him with diamonds of a kind which his customer wanted to buy?

Enlightened by these facts, the interpretation of the receipt signed by Miers is an easy matter. It can mean nothing else than an authority to sell the stones to the customer if they met his approval, and if not actually sold before demand made, they should be returned to the plaintiffs upon such demand.

This conclusion as to what was the actual authority given to Miers does not in the least affect the propriety of the decisions cited by the counsel for the respondents, and in the opinion of the court at General Term, to the effect that one intrusted simply with the possession of personal property, with no power to sell or pass title, cannot give title to the property even to a *bona fide* purchaser for value. The question here is simply what was the authority with which the man Miers was clothed, and upon the undisputed evidence in the case, we hold it was an authority to sell.

The judgment of the General Term and of the Circuit should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

ROCHE V. BROOKLYN CITY & NEWTOWN RAILROAD CO.

(106 N. Y. 294.)

Evidence — declarations — of existence of physical pain

In an action of damages for personal injuries, declarations of the injured person, some days after the injury, to one who is not a physician, and not for the purpose of professional assistance, that he is suffering pain, are incompetent evidence.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Samuel D. Morris, for appellant.

George W. Roderick, for respondent.

PECKHAM, J. The only question in this case arises upon the admission of the testimony of a third party that the plaintiff, some days after the happening of the accident which caused her injury, complained that she was suffering pain in her injured arm. The witness did not testify that on these occasions the plaintiff screamed or groaned or gave other manifestations of a seemingly involuntary nature and indicative of bodily suffering, but he proved simple statements or declarations made by plaintiff that she was at the time of making them suffering pain in her arm. The plaintiff was herself sworn and proved the injury and the pain. The condition of the arm the night of the accident was also proved that it was very much swollen and black all around it and subsequently red and inflamed, and continued swollen and inflamed more or less for a long time.

The defendant challenges the evidence of complaints of pain thus made on the ground that it was incompetent, and the argument made was that the evidence as to the injury and its extent could not be thus corroborated by mere hearsay.

Prior to the time when parties were allowed to be witnesses the rule in this class of cases permitted evidence of this nature. *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 N. Y. 344; s. c., 84 Am. Dec. 346.

* See *Cleveland v. Newell* (104 Ind. 264), 54 Am. Rep. 312.

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These cases show that the evidence was not confined to the time of the injury or to mere exclamations of pain. The admissibility of the evidence was put in the opinion of Judge DENIO, in 11 New York, *supra*, upon the necessity of the case as being the only means by which the condition of the sufferer as to enduring pain could in many instances be proved.

Substantially the same class of evidence was admitted in England and for the same reason. See cases cited in 11 N. Y. In Massachusetts too the same rule was applied. *Bacon v. Charlton*, 7 Cush. 581, cited and approved in *Rossa v. Boston Loan Co.*, 132 Mass. 439. After the adoption of the amendment to the Code permitting parties to be witnesses, the question under discussion was somewhat mooted in *Reed v. N. Y. C. R. Co.*, 45 N. Y. 574, by ALLEN, J., in the course of his opinion, although the precise point was not before the court. The question there under discussion was as to the correctness of permitting the plaintiff to prove his declarations made at the time when he was doing some work, to a third person, as to the state of his health. That is not exactly like the case of complaints made, not as to a state of health, but as to a then present existing pain at the very spot alleged to have sustained injury and proved so by other evidence; still the remarks of Judge ALLEN on this kind of evidence in general bear strictly upon the matter herein discussed. He reviewed in his opinion some of the above cases and others, and claimed that the courts had admitted the evidence from the necessity of the case as being the only method by which the condition of the party could be shown fully and completely, not only as to appearances but also as to suffering. But there was no agreement by the court upon that branch of the case, the judgment going upon another ground.

The case of *Hagenlocher v. C. I. & B. R. Co.*, 99 N. Y. 136, decides that even since the Code, evidence of exclamations indicative of pain made by the party injured is admissible. The case does not confine proof of these exclamations to the time of the injury.

The question was asked of the plaintiff's mother: "How long after the injury was your daughter confined in the bed? A. She was for about four weeks. Q. What expressions did she make or what manifestations showing that she suffered pain?" This shows there was no confinement of the evidence to the time of the injury. The evidence given however was of screams when the plaintiff's foot was touched, and of her exclamations of pain whenever the

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sheet was permitted to touch the foot. The evidence was permitted on the ground that it was of a nature which substantially corroborated the plaintiff as to her condition.

Having thus admitted evidence of this kind since the adoption of the Code amendment permitting parties to be witnesses, the question is whether there is such a clear distinction between it and evidence of simple declarations of a party that he was then suffering pain, but giving no other indications thereof, as to call for the adoption of a different rule. It seems to us that there is. Evidence of exclamations, groans and screams is now permitted more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way.

It characterizes and explains such condition. Thus in the very last case cited, it was shown that the foot was very much swollen and so sore that the sheet could not touch it. How was the condition of soreness to be shown better than by the statement that when so light an article as a sheet touched the foot the patient screamed with pain? It was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. True it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural and original and corroborative evidence of the plaintiff, as to his then physical condition. Its weight and propriety are not therefore now sustained upon the old idea of the necessity of the case. But evidence of simple declarations of a party made some time after the injury and not to a physician for the purpose of being attended professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration and of a most dangerous tendency while the former necessity for its admission has wholly ceased.

As is said by Judge ALLEN in *Reed v. N. Y. C. R. Co.*, *supra*, the necessity for giving such declarations in evidence where the party is living and can be sworn, no longer existing, and that being the reason for its admission; the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. With the rule as herein announced there can be no fear of a dearth of evidence as to the extent of the injury and the suffering caused thereby. The party can himself be a witness if

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living, and if dead, the suffering is of no moment as it cannot be compensated for in an action by the personal representative under the statute, and the exclamations of pain, the groans, the sighs, the screams can still be admitted. But we are quite clear that the bald statement made long after the injury by the party that he suffers from pain ought not to be admitted as in any degree corroborative of his testimony as to the extent of his pain.

For these reasons the evidence of Mr. McElroy as to the plaintiff's declarations of existing pain when they were walking in the street together, long after the accident, should not have been received. It was error also to permit the same witness to prove declarations of the plaintiff that her arm pained her very much even though at the same time she showed her arm and it was swollen and red. The appearance of the arm he could describe, but her declaration that it pained her very badly is mere hearsay and should not have been permitted.

The judgment of the General Term and Circuit should be reversed and new trial granted, costs to abide event.

Judgment reversed.

All concur, except DANFORTH, J., dissenting.

TOBIAS V. LISSBERGER.

(105 N. Y. 404.)

Sale — "prompt shipment" — condition precedent.

On a sale, on February twenty-second, of iron "for prompt shipment," the iron was the next day put on board ship, in a German river, frozen over and unnavigable, forty miles from the sea, and so remained till April third. *Held*, that prompt shipment was a condition precedent, and that the known unnavigable condition of the river did not excuse the delay.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

Wm. H. Page, Jr., for appellant.

Joseph A. Shoudy, for respondent.

DANFORTH, J. This action is for not accepting certain goods according to a contract made through brokers in these words:

"NEW YORK, Feb. 2, 1881.

"Sold to Mr. L. Lissberger, New York. For account Messrs. C. Tobias & Co., New York.

"About one hundred (100) tons old iron vignol rails, for prompt shipment by sail from Europe, and for delivery on dock at the port of New York (dangers of the sea excepted), at twenty-eight (28) dollars per ton of 2,240 lbs. weight, as per United States weigh-master's return. Terms of settlement as follows: Eighty (80) per cent cash, payable when rails are landed on dock, and balance payable on receipt of United States weigher's certificate.

"MANN & JONES,

"Accepted,

"Brokers.

"L. LISSBERGER."

The complaint, after setting out the agreement, alleges "that the plaintiffs promptly shipped by sail from Europe a lot of about one hundred tons of such rails and duly performed all the conditions of the contract on their part, and on the 14th of June, 1881, were ready and willing to deliver, and duly tendered" the rails to the defendant, who refused to accept or pay for them; that upon notice to defendant they sold the rails on his account, and after applying the proceeds there remained due \$345.15, for which, with interest from June 14, 1881, they ask judgment. The defendant by answer expressly admits the contract, and that on the fourteenth of June the plaintiffs were willing to deliver, and then tendered to him, the rails mentioned in the complaint, a refusal on his part to accept, and that the plaintiffs after notice sold the same; he denies however the other allegations in the complaint, and particularly denies that the goods were promptly shipped from Europe, and says that on the contrary there was a delay of two months or thereabouts in such shipment, in consequence of which the goods were of less value in the market than they would have been if promptly shipped; that in this omission the plaintiffs failed to perform the contract on their part, and he therefore refused to accept the rails.

Upon the trial of these issues the plaintiffs read the deposition of the captain of the ship "Brunn," to the effect that his vessel, then lying at Stettin, Germany, was chartered on the 1st of January, 1881, for different kinds of goods for New York. Stettin was about forty miles from the sea, situated upon a river. That on

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the 3d of February, 1881, he received on board from the shippers, Ignatz Rosenthals, Wie & Company, 535 pieces of old rails, deliverable in New York, on payment of freight. The bill of lading then given by him, dated February 3, 1881, and produced by the plaintiffs, is to the same effect, and purports to be indorsed in blank, "Ignatz Rosenthals, Wie & Co." It also appeared from the captain's testimony that when these rails were shipped the river was frozen fast, the ice being two or three feet thick. It was then expected the ice would break up in March. But the river, which had become closed to navigation about the twentieth of January, remained so until the second or third of April, on which last-named day the vessel sailed, and after a voyage of the ordinary length arrived at New York. Usually the ice had broken up at Stettin late in February or early in March, but the winter of 1881 was of extraordinary severity. It was shown in evidence that rails of the kind described in the contract could have been obtained at any time in other European ports, where detention by ice was unknown — ports even in Germany as well as in France and England, and among others, London and Liverpool. They seem to have been common in the markets and to be easily procured.

It is stated by the respondent that the only question litigated at the trial was whether the goods were promptly shipped according to the terms of the contract, and the record sustains that view. The trial judge, against the exception of the defendant, directed a verdict for the plaintiffs. Upon denying a new trial, he was of opinion that "prompt shipment," under the words of the contract, was within the shipment proven, saying also that "if the defendant wished to provide against a distant port in Europe, or any other delaying cause, it was in his power to make it part of the contract," and failing to do this, says: "I think the point he makes cannot be sustained." But he added: "I do not put the decision of the case on the grounds above stated, but upon the ground that after the contract, after notice of shipment, the defendant waited until after the arrival here before making the objection now made." The General Term discusses only the ground first stated by the trial judge, and by a divided court sustained his decision.

The minds of the parties met when the sold note was communicated to and accepted by the defendant. It is the only evidence of the contract, and upon its proper construction the rights of the

plaintiffs depend. Their action is upon the theory that the contract imposed upon them the obligations of bringing the goods to New York, and there having them ready for delivery. They were therefore to furnish the rails either by selection from their own stock, or by purchase or other means, but however obtained, the rails were to be got from Europe by sailing vessel at the expense and at the risk of the vendors. They were to ship the rails in such vessel as they chose, on such terms as they and the master could agree upon; they were to land them on the dock in New York, and at that moment only did any duty attach to the defendant who was then to pay a certain proportion of the price. The vendors were to procure the weighmaster's return, and on its receipt the balance became due.

The plaintiffs then have sold a quantity of iron, and the question arises as to how the condition shall be performed which will enable them to make delivery and entitle them to demand payment from the vendee. No time is specified, and if there was nothing else in the contract, it would undoubtedly be the duty of the vendors to make delivery of the thing sold within a reasonable time, and to determine whether the plaintiff had been able to do so, the facts and circumstances attending the transaction would have to be considered. But although the contract specifies neither month nor day, nor duration of time within which or on which they must perform, it does specify the manner of doing the act which makes performance possible. The contract provides for "prompt shipment," and it is this condition on which all other stipulations hang. So the plaintiffs understood it, and as we have seen, they alleged as a condition precedent to the right of action that they "promptly shipped" the iron. This implies expedition, admits of less delay than would be permitted under a covenant to act merely within a reasonable time, and in effect the plaintiff interpret it as meaning "directly" or "at once." Such indeed was their conduct. The contract was made in New York on the 2d of February, 1881, and the plaintiffs rely upon a bill of lading showing that on the very next day, at Stettin, iron rails, answering in description to those named in the contract, were put on board a vessel chartered for New York. Therefore the respondent's contention is that the whole condition is satisfied and "if any delay thereafter occurred to the prejudice of the defendant, he must look to the ship for his indemnity." The last position fails when we see that

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no privity existed between the defendant and the vessel or its master, and that his only contract relation was with the plaintiffs. The sole object of prompt shipment was to secure a speedy arrival for delivery in New York. Until then the goods were at plaintiff's risk and only then could the defendant's liability attach. Before that event happened there was to be neither transfer of title nor transfer of possession. It is quite unimportant to inquire how it might be as between the master of the vessel and the plaintiffs, or the shipper, one of whom may be assumed to be the owner, and the other by virtue at least of the bill of lading entitled to possession. In the case before us it is more reasonable to construe the condition of prompt shipment as a precedent to delivery, and so relating to the actual commencement of the voyage that the known unnavigable condition of the river could furnish no excuse for the delay. The defendant was entitled to such timely delivery as would follow an effective shipment; in other words, to an exact performance by the plaintiffs of their contract to ship and deliver, not two things separable in their nature, but two steps to a single end. That involves not only a purpose to transport, but an expectation that transportation would commence, if not at once, certainly within a reasonable time. Shipment cannot be said to have been made from Europe when the port selected had no passage-way or outlet. Nor can it be fairly argued even that the iron was shipped "for delivery in New York," if it was apparent to the shipper that the vessel could not leave the docks where it took in freight. Something more than shipment was bargained for, viz., prompt shipment, and the delivery was to be within such time as, dangers of the sea only excepted, might reasonably follow. Nothing less could have been in the minds of the parties than expedition, or immediate and effective, or beneficial shipment as a step toward delivery. Payment was postponed to delivery, both to be made in New York. The sale was for shipment from Europe, altogether at the vendor's expense and risk, and no exception was provided for save "dangers of the sea," among which a certain and safe confinement in port is not included.

In *Duncan v. Topham*, 8 O. B. 225, the order was for certain goods to be put on board directly. The complaint alleged an order for goods to be delivered within a reasonable time, and the plaintiff failed in his action because the proof did not support the declaration, it being held that "a reasonable time" was a more protracted

delay than "directly." The contract here goes further. "Prompt" is synonymous with "quick," "sudden," "precipitate." Indeed, one who is ready is said to be prepared at the moment, one who is prompt is said to be prepared beforehand. Such represents the condition of the plaintiffs. Their immediate loading of the vessel shows that they were prepared beforehand, but if their construction of the contract is correct, the qualifying word might as well be one of postponement and delay. The fault was with the plaintiffs. It was optional with them to ship from any port in Europe. If at the time of shipment the plaintiffs or their agents knew or might have known that detention and delay at the place of shipment and before ground could be broken for the voyage were unavoidable and to be expected, they must also have known that the delivery could not be made as contracted for and the subsequent tender was too late. It was not a "prompt shipment," and the defendant was not bound to receive the cargo.

It is now contended, however, by the plaintiffs that the appellant is estopped from denying that the rails were shipped in accordance with the terms of the contract. This might, under some circumstances, furnish a question for the jury. It cannot be said, as matter of law, that those now relied on have that effect. It appears that the usual length of a voyage from Stettin to New York is forty-nine days. On the first of March the defendant was notified by the plaintiffs that the 100 tons of rails sold to him "are shipped * * * from Stettin," but the date of sailing was not given, and in answer to defendant's inquiry concerning it, the plaintiffs replied they were not informed. On the nineteenth of March they told him the bill of lading was dated February third, but that they had "no date of the vessel's sailing." On the fourth of May they wrote: "According to New York Maritime Register, the Ger. Bk. 'Ferdinand Brunn,' with 100 tons rails sold to you, sailed from Stettin April sixth for New York." The vessel arrived at New York, and on the fourteenth of June, when tendered by the plaintiffs, the defendant in writing refused to receive them, saying the rails were not shipped according to contract.

We find nothing in these letters which would authorize a court to say that the defendant had waived performance by the plaintiffs. There is no evidence that he knew the circumstances attending or causing the delay, none that he was informed that the vessel, when loaded, was ice-bound, nor of its detention from that cause. More-

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over the sole act relied upon in the complaint as a breach of the contract on defendant's part, a refusal to accept the rails tendered, took place, as is there alleged, and is admitted in the answer, on the fourteenth of June. Then the plaintiffs say they were ready and willing to deliver, and duly tendered the goods, and the defendant refused to receive them. If I am right in my view of the contract he was under no obligation to do so.

I have not overlooked the argument of the plaintiffs, by which our attention is directed to the difference between "shipment" and "sailing," nor failed to examine the definitions and decisions upon which the argument is founded. The context of the cases cited however prevents the application of the decisions to the one before us; and while the terms are, no doubt, well defined, there is no definition nor adjudged case which implies that an agreement to deliver goods after prompt shipment is satisfied by merely placing them on board a vessel, which although it should weigh anchor or cast off moorings, and make other preparations to depart, could not for a considerable period of time—in this case exceeding the customary length of the intended voyage—leave the spot where the cargo was received. Such a shipment would be colorable and deceptive. If it answered the letter of the contract, it defeated its purpose. It would not, in fact, be the inception of the voyage, and the burden of showing a *bona fide* shipment would not be sustained. In all the cases referred to by the respondents, the obligation to ship at or within a certain period was held to be unperformed, unless the ship might also sail at or within the time stated. Nothing else would be beneficial to the purchaser. The evident object of expressing the time of shipment, as declared in those cases, was to provide that the article purchased should come forward at such time as would, in the opinion of the purchaser, make the venture profitable, or as to time of arrival, or payment, suit his convenience. *Bowes v. Shand*, 2 App. Cas. 455; *Alexander v. Vanderzee*, L. R., 7 C. P. 530.

Another class of cases, also cited by the respondents, shows that when goods are sold and are to be delivered on board of vessels, either provided by the purchaser or by his appointment, putting on board is a good shipment, whether the vessel is in condition or is expected to sail or not. *Fisher v. Minot*, 10 Gray, 260; *Newhall v. Vargas*, 13 Me. 93, 105; s. c., 29 Am. Dec. 489. The principle on which these cases were decided is not involved here, and the others do not lessen the strength of the appellant's case.

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The time and manner and place of shipment might indeed have been accepted by the defendant as in compliance with the contract, and whether it was or not, and whether with full knowledge of the facts there was on his part a waiver of the strict performance of the condition on the plaintiffs' part, were questions for the jury. The trial court therefore erred in directing a verdict for the plaintiffs.

It follows that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur, except RUGER, C. J., dissenting.

GRAVILLE V. MANHATTAN RAILROAD COMPANY.

(105 N. Y. 525.)

Carrier — railroad — duty of passenger to go inside car.

It is the duty of a passenger standing on the platform of a steam railroad car to go inside the car when requested so to do by a trainman, if there is standing room inside, although there are no vacant seats.

ACTION for assault. The opinion states the case. The plaintiff had judgment below.

Edward S. Rapallo, for appellant.

L. A. Gould, for respondent.

PER CURIAM. The counsel for the defendant requested the court to charge the jury that although there were no seats inside the car, and people were standing therein, yet if there was room for the plaintiff he was bound to go there. The court refused to charge as requested, and to this refusal the counsel for the defendant excepted. We are of opinion that the defendant was entitled to this instruction, and that the exception was well taken.

It appears from the plaintiff's testimony that he boarded a train going north, at Houston street, at about six o'clock Sunday evening. The car at the time was crowded, and the plaintiff, with other passengers, stood on the platform. When the train reached Thirty-fourth street the brakeman requested the plaintiff and the other passengers on the platform to go inside the car, but as there was

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no room in the car at that time the plaintiff did not do so. Passengers got out of the car at Forty-second street, and on the train leaving that station the conductor requested the plaintiff to go inside, but he declined to do so. The conductor or brakeman then pushed the plaintiff inside the car. When the train reached Forty-seventh street the plaintiff, as he testifies, passed from inside the car on to the platform for the purpose of leaving the train at that station, and when he reached the platform the conductor took hold of him and pulled him off the car, and a struggle ensued between the plaintiff and the conductor, the details of which it is unnecessary to state. The plaintiff on the trial testified to the act of the brakeman in pushing him into the car and to the subsequent assault at the station, and relied upon both acts as constituting grounds of recovery. Both of the transactions were litigated without objection, and were submitted by the court to the jury, and they rendered a general verdict. The request to charge related to the first assault, and if it should have been granted the error cannot be disregarded. The counsel for the defendant on the argument sought to justify the act of the brakeman in pushing the plaintiff into the car on the ground that his standing on the platform was a dangerous act and interfered with the proper management of the train, and that the brakeman was authorized to use necessary force to compel the plaintiff to go inside the car if there was standing room, although all the seats were occupied. This question is not, we think, open to the defendant on this record. The court charged the jury that the brakeman had no right to force the plaintiff inside the car upon his refusal to go inside, and that the only remedy was to eject the plaintiff from the car on reaching the next station. The counsel for the defendant did not except to this ruling, but by his silence acquiesced in its correctness, and it must be regarded as the law of the case. But assuming that the law in this respect was correctly stated, as to which there is, it seems to us, room for serious doubt, nevertheless we think the court should have charged the proposition requested. Whether on the plaintiff's refusing to comply with the request of the brakeman to go inside the car, the latter was authorized to use force to compel him to do so, is a distinct question. It is a matter of common knowledge that it is unsafe for passengers to ride on the platform of a running train. By so doing they expose themselves and the other passengers to unnecessary danger. The law exacts of carriers of passengers the highest

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degree of care for their safety. The control of trains is necessarily placed in the hands of employees. It is impossible to foresee all the exigencies which may demand prompt action on their part to avert danger or accident. The safety of passengers on railroads requires that they should comply with reasonable regulations and acquiesce in reasonable directions of persons to whom the management of the train is committed. It is obvious that the crowding of passengers on the platform of a steam railroad car may seriously embarrass the trainmen in the performance of their duties, and it is, we think, the plain duty of a passenger standing on a platform to go inside the car when requested so to do by a person having charge of the train. The request to charge was material as bearing upon the question of damages, assuming that the use of force by the brakeman was not justified. Although the brakeman may have been mistaken as to his authority to enforce a compliance with the request made to the plaintiff, yet it was the duty of the plaintiff to comply, and his refusal tends to mitigate and explain the conduct of the brakeman, and to show that the assault was not wanton or malicious. The fact that there were no unoccupied seats in the car did not, we think, change the duty of the plaintiff to go inside. If he had any well-founded ground of complaint against the company for not providing adequate accommodations for passengers, this did not, we think, release him from the duty of leaving the platform and going inside the car, although there was standing room only. The car was crowded when the plaintiff entered it at Houston street. He placed himself immediately in a position where he was compelled to submit to some inconvenience, and he was not freed from the obligation to obey the reasonable directions of the trainmen, made with a view to the general convenience and safety, because there was no vacant seat.

For the error in the refusal to charge, the judgment should be reversed and a new trial granted.

Judgment reversed.

All concur.

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THOMAS V. EVANS.

(105 N. Y. 601.)

Deed — holder under imperfect title — compensation for improvements.

Where a person in peaceable possession under claim of lawful title, but really under a defective title, has in good faith paid assessments and made permanent improvements, the true owner who seeks the aid of equity to establish his title will be compelled to reimburse the occupant for his expenditures.

ACTION to set aside deed. The opinion states the case. The plaintiff had judgment below.

Geo. H. Starr, for appellant.

William G. Cook and *William C. Wallace*, for respondent.

RUGER, C. J. In July, 1841, Thomas Thomas died, leaving him surviving Catharine Thomas, his widow, and four children, three of whom were aged, respectively, three, five and six; the fourth, Sarah Thomas, has since died intestate and without issue. At the time of his death Thomas owned in fee eight small city lots in Williamsburg, six of which were situated on South First, and two, the lesser value, on South Second streets, and with the exception of two lots on South First street, were vacant and unimproved. So far as appears from the case, Thomas had no other property, real or personal, and such as he had he devised to his widow for life, with remainder to his four children. By the will he appointed his wife executrix and John L. Bulkley executor of his estate, and authorized them to "sell the whole or any part of his real estate when they may deem best for those interested therein, either at public or private sale, and invest the proceeds in bonds and mortgages or other securities, as they may believe best." He also appointed his wife guardian of all his children.

In December, 1841, the widow intermarried with the defendant Evans and lived with him as his wife until the year 1878, a period of thirty-seven years, and nearly twenty years after all the children had arrived at maturity.

It is conceded that by the will the widow took a life estate in the property of her husband, and that upon her marriage with Evans he became entitled to the enjoyment of her interest therein

and that the four children took a vested estate in remainder in such property. Between the years 1841 and 1850 the defendant Evans made considerable improvements upon the property on South First street and rendered some of it productive, which was before a burden and expense to the estate. For the purpose partly of paying the liability of the estate to Evans for these improvements, and partly to raise money to meet anticipated assessments upon the property, the executors, in 1850, sold and conveyed to Evans, for the agreed price of \$1,000, the two vacant lots on South Second street. Three hundred and fifty dollars of this sum was applied as a payment to Evans for the expenses incurred by him, and the balance of \$650 was secured by a mortgage upon the property given by Evans to the executors. The price paid was a fair consideration for the land, and all parties then supposed that Evans acquired a valid title under the power of sale contained in the will. Subsequently however, upon attempting to raise money upon the lots for building purposes, Evans was advised that by reason of his relationship with one of the grantors his title was defective, and thereupon he consented to institute an action to have such title declared void and to reinstate the power of sale in the executors. Such proceedings were thereupon had in the Supreme Court that judgment was rendered, declaring the conveyance from the executors to Evans null and void and reinstating them with the interest attempted to be conveyed.

Between 1850 and 1854, other assessments were levied upon the property of the estate for municipal improvements and the executors had no means to pay them. These assessments were mainly levied upon the lots on South First street. At the request of the executors Evans advanced some money to pay them, but the estate was still unable to meet the other burdens upon the property. Under the circumstances the defendant Evans, under an agreement with one Swackhamer, to repurchase the property and repay him its cost and such money as he should expend upon it with a bonus of \$500, for his risk and trouble, induced Swackhamer to enter into a contract of purchase of the two lots on South Second street with the executors for the price of \$2,000. In 1853, the executors conveyed the property to Swackhamer, receiving therefor \$300 in cash, Swackhamer's not for \$700, and a release by Evans to the executors of their indebtedness to him for money advanced and expended for assessments and improvements upon the property. The price

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paid was more than the value of the property and the Thomas estate received the full benefit thereof. It does not appear that the executors had any knowledge of the agreement between Evans and Swackhamer, or that any of the parties had any doubt but that Swackhamer acquired a valid title to the property by the conveyance. Upon receiving his deed Swackhamer executed a mortgage upon the property to third parties for the sum of \$4,500, which sum was wholly expended in erecting three substantial brick dwellings upon the two lots. In 1856, in accordance with his agreement with Evans, Swackhamer conveyed the property to him, receiving in payment therefor the sum of upward of \$7,000. Immediately upon receiving his deed, Evans caused it to be placed upon record, and from that time forward, claimed to be the absolute owner of the property.

Since Evans' occupation of the lots, he has continued to make additions to and improvements upon them, the value of which, including the original cost of the houses, as found by the trial court, exceeded \$9,000 at the time of the trial. In 1879, Evans conveyed to each of the two other defendants, Catharine J. Scofield and Jessie E. Scofield, one of the houses erected on the two lots on South Second street in consideration of his love and affection for them as his daughters.

This action was brought by two of the remaining children of Thomas, the other one refusing to join therein as a plaintiff, in April, 1881, for the purpose of vacating and annulling the deed given by the executors to Swackhamer, and all subsequent conveyances of the property, and having it adjudged that the two lots with their improvements were the property of the plaintiffs, and requiring the defendants to release and convey the property to them, and that the defendant Thomas J. Evans render an account of all of his transactions with the estate of Thomas Thomas, and be decreed to pay to the plaintiffs such sums as might be found due upon such accounting. The right to relief was based exclusively upon the allegation in the complaint that the defendant Evans obtained title to the property from the executors "for the purpose of enabling the executors more conveniently to manage the said estate through the defendant Thomas J. Evans, and with a view to increase the revenue for the said real estate and to put the title thereof in the said Thomas J. Evans, as trustee for the said Catharine Evans and the children of the said Thomas Thomas, deceased."

Upon the trial no proof was offered by the plaintiffs of the existence of the trust and agreement alleged in the complaint, but the action was sustained upon the ground that the conveyance by which the land was transferred from the executors to Swackhamer was not a valid exercise of the power of sale given to them by the will of Thomas, and constituted a cloud upon the title of the true owners, which should be removed. The decree also denied to the defendant the right to compensation for the improvements made to the property by him. The ground upon which this conclusion was reached is stated to be that Evans was not a *bona fide* purchaser of the premises. This conclusion was based upon the finding of law made by the trial court, that neither Evans nor the other defendants were *bona fide* purchasers of the land.

It is not entirely clear what the trial court meant by this finding of law, but if it was intended to convey any other idea than that it was simply a legal deduction, from the assumed fact that the conveyances to Swackhamer and Evans were void, by reason of the alleged invalidity in the execution of the power of sale, it is contrary to the findings of fact made by the court, and is unsupported by any evidence in the case. It was found by the trial court, that from 1856 Evans always claimed to be the absolute owner of the property, and that this claim was known to and acquiesced in by the plaintiffs appears from the allegations of the complaint. It is therein averred that "the plaintiffs have all been for many years of full age and have not requested the transfer of said title to them because of the positive assurance they all had from the said defendant, and from the said testatrix, in her life-time, that the same was held for the estate, and because their mother, the said testatrix, was entitled to the income of the same until her death." This excuse, so far as it alleges any assurance from the defendant Evans, or his wife, of the existence of a trust, is not, as we have seen, supported by the evidence.

It also appears that some, if not all, of the surviving children of Thomas, after their majority, had knowledge of the expenditures that the defendant Evans made, not only upon the property in dispute, but also upon the other real estate remaining unsold, and so far from making any objection thereto, actually requested them to be made.

A careful perusal of the evidence in the case shows us that Evans, in the right of his wife, came into the possession of eight lots in

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1841, and although both he and the estate were destitute of means to improve it or to pay the taxes or assessments levied thereon, it was so managed as to make it more valuable and productive, and to preserve for the remaindermen the greater part of the estate. In the meanwhile he provided a home for the widow and children of Thomas, and educated and supported the children, not only until their majority, but some of them until long after that time. Under these circumstances it is not strange that the remaindermen have hesitated so long to assert any rights to the two lots in question, and that one of them refused altogether to become a party to the proceeding.

A claim to recover back property which has been fairly sold and paid for at its full value, and the consideration of which has accrued to the benefit of the plaintiffs, without offering to render compensation to one, who honestly believing himself to be its lawful owner, expended large sums in its improvement, and which now constitutes its greatest value, seems to be unjust and inequitable.

We are of the opinion that the purchase-price originally paid for the land and the value of the improvements, to the extent that they have added to its permanent value, constitute an equitable claim, and that even if the plaintiffs should establish an equitable right to the property it would not entitle them to judgment therefor, except upon the condition of refunding to the defendant Evans the amount so expended.

It was found by the trial court that the purchase-price was mainly paid in relieving the land from the assessments imposed upon it. These assessments were a charge upon all of the land, and the interest of the remaindermen, as well as that of the life tenant, was liable to be sold therefor. It is provided by statute, in the case of real property in which several persons have successive interests, incumbered by taxes and assessments, rendering it liable to sale therefor, that upon the application of any of the parties interested the court may order a sale of the fee or a part thereof for the purpose of discharging the liens upon the remainder. Chap. 341, Laws of 1841; chap. 357, Laws of 1855; *Jackson v. Babcock*, 16 N. Y. 246; *Dikeman v. Dikeman*, 11 Paige, 484. Thus the property of the plaintiffs was legally liable for the payment of these assessments. Although the method provided by statute was not pursued, we see no reason why a court of equity, called upon to settle the equitable rights of the parties, should not charge remaindermen

with the reimbursement of moneys actually and honestly expended for the benefit of their estate, and which they were legally liable to pay.

The general rule applicable to the relation of life tenants and remaindermen does not authorize the former to charge the latter with the cost and expense of permanent improvements put upon the property by him during the life tenancy. *Dent v. Dent*, 30 Beav. 363; *Moore v. Cable*, 1 Johns. Ch. 385. This rule is founded upon principles of justice having reference to the rights and interests of remaindermen, and should not be inconsiderately impaired or evaded.

It is also the general rule that municipal assessments for permanent improvements upon land are apportionable between the life tenant and the remaindermen, according to the circumstances of the case, and their respective interests in the property (*Stillwell v. Doughty*, 3 Bradf. 359; *Peck v. Sherwood*, 56 N. Y. 615), while the ordinary taxes of government are properly chargeable to the life tenant alone. *Deraismes v. Deraismes*, 72 N. Y. 154; *Cairns v. Chabert*, 3 Edw. Ch. 312. Such are the rules applicable to those relations, when they are open and acknowledged, and no special circumstances exist authorizing the application of principles of equity, to reimburse one who in good faith has increased the intrinsic value of the property, by expending his own means in making permanent erections and valuable additions thereto under the belief that he was its lawful owner. Such circumstances are held to exist when a trustee or mortgagee in possession supposing, in good faith, that he has acquired title in fee to the property, goes on and deals with it as his own, and makes improvements which are of permanent benefit to the property. *Putnam v. Ritchie*, 6 Paige, 390; *Mickles v. Dillaye*, 17 N. Y. 86. In the *Putnam* case the chancellor laid down the rule, as expressed in the head-note, that "when industrial accessions have been made to property, in good faith, by a person who has the legal title to the property, so that the real owner is compelled to resort to a court of equity to assert his equitable title to such property, this court acts upon the civil-law rule of natural equity and compels the complainant to compensate the adverse party for such industrial accessions or improvements, as a condition of granting the equitable relief asked for in the suit." This was the case of a guardian in socage of infants having a leasehold estate in fee in certain lands, which lease during the

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infancy of the wards was for a good consideration, surrendered by such guardian to the heir of the lessor. It was held that a guardian in socage has no right to surrender a lease in fee belonging to his wards, but that when the legal title is in a trustee, or when the guardian of an infant has complete legal control over the property so as to place it fully within the power of the chancellor, as the general guardian of infants, the court may sanction the acts of the trustee, or guardian, although not strictly legal, if the same are done in good faith and for the benefit of the estate of the infant.

In *Mickles v. Dillaye*, 17 N. Y. 80, 86, the rule was applied to a mortgagor who attempted to redeem from a mortgagee in possession under a voidable sale, and the rule adopted is expressed in the head-note of the case as follows: "When valuable and permanent improvements have been made in good faith by a person standing upon the legal footing of a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the owner, for several years before and after the improvements, to assert any interest in the premises, the mortgagor, on asking the aid of equity to redeem, will be compelled to allow the value of the improvements, though exceeding the rents and profits received."

In *Bright v. Boyd*, 1 Story, 478, lands had been sold by an administrator, but the sale was void because he had not given security according to the statute. The heir sued the purchaser and recovered possession of the land. The purchaser then filed his bill in equity to recover from the heir the value of certain improvements, including the cost of building a large dwelling-house, which he had in good faith put upon the premises while occupying them. Judge STORY referred the case to a master to take an account of the enhanced value of the premises, with a strong intimation that the plaintiff was entitled to recover that expense, but postponed the final decision of the question until the coming in of the master's report.

Judge DENIO, citing this case in *Mickles v. Dillaye*, entertained some doubt whether it could be sustained here except upon the principle of estoppel against one fraudulently standing by and seeing another expend money upon his land, although he expressly approved the rule laid down by the chancellor in *Putman v. Ritchie*. In the same case he also approved of the doctrine laid down by Judge HAND in *Wetmore v. Roberts*, 10 How. Pr. 51. In that case

the defendant had bought the premises from one who had purchased them upon a sale on a prior mortgage, in the foreclosure of which a junior mortgagee had not been made a party. Upon a foreclosure of the junior mortgage it was held that the premises should be sold and the defendant should be paid from the purchase-money, not only the amount due on the elder mortgage, but also for improvements made by him during his occupation of the property.

In *Minor v. Beekman*, 50 N. Y. 339, it was said by GROVER, J., that "when a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments, and for such improvements, according to the just and enlightened principles of courts of equity."

Pomeroy, in a note to section 1242 of his work on Equity Jurisprudence, states the rule as follows: "When a person in peaceable possession under claim of lawful title, but really under a defective title, has, in good faith, made permanent improvements, the true owner who seeks the aid of equity to establish his own title will be compelled to reimburse the occupant for his expenditure."

Many authorities are cited in support of the proposition. In *Ford v. Knapp*, 102 N. Y. 135, the principle is laid down that in an action by a co-tenant out of possession for a partition of the premises, upon which the other tenants in common have paid taxes and made improvements in good faith, which have largely increased the value of the property, the amount of such taxes and improvements shall in case of "sale of the property" be first deducted from the gross sum received, and paid to the improving tenants, and the balance only divided among the parties according to their respective interests. The case was decided upon the rule "that one who seeks equity must do equity," and that the tenant, out of the actual occupation who seeks a court of equity to award him partition, is entitled to the relief only upon condition that the equitable rights of his co-tenants shall be respected." We think the circumstances of this case bring it within the principle of the cases above cited.

Previous to the year 1860, all of the remaindermen had arrived at years of maturity and were aware that the defendant Evans

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claimed to be the absolute owner of the property in question. For over twenty years they not only neglected to dispute such claim, but permitted the defendant to go on in apparent security as to his title, and make improvements upon the property and deal with it as his own. There seems to exist here the natural equity which entitles a party who has in good faith, with his own means, improved the property of another, to reimbursement by the parties benefited thereby, and this equity is strengthened by the conduct of the owners who stood by and saw such party, without notice or objection, incur expense under the belief that he was improving his own property.

We are therefore of the opinion that the trial court should have imposed as a condition of any relief to the plaintiffs the reimbursement by them to Evans of the original price paid by Swackhamer for the lots, and also of such sums as were expended by Swackhamer and Evans in their improvements, so far as they have increased the value of the land, and in case Evans is charged with the rents received from the property since the death of the life tenant, he should be allowed interest on the amount payable to him.

The plaintiffs have sought their remedy in equity, and that course seems to have been requisite as the condition of a right to the relief demanded. The deed from the executors to Swackhamer apparently conferred the legal title under the power of sale contained in the will. The purchaser was under no responsibility for any misapplication by the executors of the consideration paid by him for the land, and was entitled to rely upon their apparent power to receive such consideration and to convey the land given to them by the will. 3 R. S. (7th ed.) 2183, § 66. We have altogether refrained from discussing the question as to whether the conveyance by the executors to Swackhamer was a valid execution of the power of sale.

There seems to be much reason for saying, under the peculiar condition of this property, its unproductive character and the want of means in which the testator left his family, the liability of the property to be sold for taxes and assessments for municipal purposes, that the real limitation intended to be put by the testator upon the power of sale was contained in the words that it should be sold when his executors "may deem best for those interested therein," and not in the language by which they were directed "to invest the proceeds in bonds and mortgages or other securities as they may believe best." Some diversity of opinion however exists

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among the members of the court upon this question, and we therefore refrain from determining it, believing that the point decided will substantially dispose of the case upon a retrial.

The judgments, both interlocutory and final, of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur.

CASES
IN THE
SUPREME COURT
OF
KANSAS

STATE V. CITY OF TOPEKA.

(36 Kans. 76.)

Constitutional law — taxation and regulation of dogs — working out taxes.

Statutes and ordinances regulating, restricting or prohibiting the running of dogs at large in cities, and authorizing the summary killing of dogs so running at large, and dividing them into classes with different fees for registration, are constitutional.

The imposition of labor on the streets of cities in payment of taxes is valid.

QUO WARRANTO. The opinion states the case. Petition dismissed below.

G. C. Clemens, for relator.

Jasper H. Moss, city attorney, for defendant.

VALENTINE, J. This is an action brought originally in this court in the name of the State of Kansas, to oust the city of Topeka from the alleged illegal exercise of various powers. Before submitting the case to the court, the parties entered into the following stipulation:

"It is hereby agreed that all questions submitted by the petition in this case may be dismissed without prejudice, except the first and second allegations of said petition, being the alleged illegal exercise of power in requiring dogs to be registered and to destroy

dogs found running at large in said city, and the collection of a road or poll tax from certain of the citizens of said city."

The petition, to the extent stipulated, was dismissed in accordance with the agreement of the parties. The defendant answered, denying that it has exercised any powers not conferred upon it by law, and setting forth its ordinances with respect to dogs, and to road or poll taxes; and the case was submitted to the court upon the petition and the answer.

The plaintiff's first claim is, that the statute and the ordinance regulating the running at large of dogs are unconstitutional and void; and its council founds this claim principally upon the proposition that dogs are property, and he cites many authorities to sustain this proposition; but the proposition has seldom if ever been questioned, and so far as this case is concerned it will be admitted. But it does not follow, that because dogs are property, no statute or ordinance can be passed regulating, restricting or prohibiting the running at large of dogs, or for their destruction in case they are permitted to run at large in violation of law. Bulls and stallions are also property, and property of a much higher grade than dogs, and yet their running at large may be regulated or prohibited. Even venomous reptiles, skunks and hyenas, may be made property; and yet when they are made property it does not follow that their running at large in populous cities cannot be regulated or prohibited. The plaintiff also cites many authorities to the effect that horses, hogs, cattle and other like valuable property cannot be destroyed or confiscated without a judicial investigation and determination upon proper and legal notice to the owner; but it does not follow from these authorities that the running at large of dogs may not be regulated, restricted or prohibited, or that dogs may not be killed if found running at large in violation of law. Nor does it follow from these authorities that the killing of dogs found running at large in violation of law is not "due process of law" under both the State and the Federal Constitutions. As we have already stated, property in dogs is not of that high character that property in many other things is. *City of Independence v. Trouville*, 15 Kans. 73; *Woolf v. Chalker*, 31 Conn. 121, 127; *Blair v. Forehand*, 100 Mass. 140; s. c., 1 Am. Rep. 94; *Ex parte Cooper*, 3 Tex. Ct. App. 489; s. c., 30 Am. Rep. 152; *Leach v. Etwood*, 3 Bradw. 457; 4 Bl. Com. 236. Mr. Blackstone, in his Commentaries, speaks of property in dogs as a "base property," and dogs

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were not the subject of larceny at common law; and they are seldom assessed for taxation, and seldom have a market value.

It is also claimed that the registration fee required to be paid upon the registration of each dog is a tax, and that it is not levied at a "uniform and equal rate," as required by section one, article XI of the Constitution. We suppose it will be admitted that said registration fee is a tax; but clearly it is not that kind of tax contemplated in the aforesaid provision of the Constitution. It is a tax levied for the purpose of regulation and restriction, and is not a tax levied merely for the purpose of raising revenue, as that provision contemplates. That it is not unconstitutional because it is a tax, we think follows from the following decisions: *City of Newton v. Atchison*, 31 Kans. 151, and the numerous cases there cited; *Tulloss v. City of Sedan*, 31 Kans. 165, and cases there cited; *City of Cherokee v. Fox*, 34 Kans. 16; *Ex parte Cooper*, 3 Tex. Ct. App. 489; s. c., 30 Am. Rep. 152; *Mitchell v. Williams*, 27 Ind. 62; *Tenney v. Lenz*, 16 Wis. 589; *Van Horn v. People*, 46 Mich. 183; *Hendrie v. Kalthoff*, 48 Mich. 306; *Commonwealth v. Markham*, 7 Bush, 486; *Mowery v. Salisbury*, 82 N. C. 175; *Holst v. Roe*, 39 Ohio St. 340; s. c., 48 Am. Rep. 459; *Cole v. Hall*, 103 Ill. 30.

It is also claimed that all dogs are not taxed alike, and therefore that the tax is invalid. The tax is a registration fee of two dollars for each male dog and five dollars for each female dog," where the dogs are more than six weeks old, and no fee where the dogs are less than six weeks old. Now as before stated, this tax is imposed for regulation and restriction, and not merely for revenue, and therefore under the authorities above cited we think it is valid.

The plaintiff also claims that the statute and city ordinance providing for the summary destruction of dogs found running at large, in violation of the ordinance, are unconstitutional and void; and it cites as authority in many cases, only one of which however, as we think, can fairly be said to sustain its view, and this authority is not entirely parallel with the present case. This authority is the case of *Mayor of Washington v. Meigs*, 1 MacArth. 53; s. c., 29 Am. Rep. 578. On the other hand we have numerous authorities which assert the opposite doctrine and fully sustain the validity of the statute and the ordinance put in question in the present case. These authorities are the last nine cases previously cited and also the following cases: *City of Independence v. Trouvalls*, 15

Kans. 70; *Woolf v. Chalker*, 31 Conn. 121; *Blair v. Forehand*, 100 Mass. 136; s. c., 1 Am. Rep. 94; *Commonwealth v. Palmer*, 134 Mass. 537; *Haller v. Sheridan*, 27 Ind. 494; *State v. Cornnall*, 27 Ind. 120; *Lowell v. Cathright*, 97 Ind. 313; *Morey v. Brown*, 42 N. H. 379; *Leach v. Flwood*, 3 Bradw. 453. See also *Bowers v. Fitz Randolph*, Add. (Penn.) 215; *King v. Kline*, 6 Penn. St. 318; *Marshall v. Blackshire*, 44 Iowa, 475. Under the almost unbroken current of authority we think that statutes and ordinances may be passed regulating, restricting or even prohibiting the running at large of dogs in cities, and this although dogs are unquestionably property; that the owners, keepers or harborers of dogs in cities may be required to register the same and to pay a registration fee therefor, although this fee may in one sense be a tax, though not a tax within the meaning of section 1, article XI, of the State Constitution; that dogs in cities may be classified, and the owners, keepers or harborers thereof may be required to register all the dogs of one class and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of dogs of another class; and such owners, keepers or harborers of dogs may also be required to put collars around the necks of their dogs; and that any dog found running at large in a city, in violation of the statutes or ordinances, may be summarily destroyed, and that all this is constitutional and valid, and is "due process of law," and that by the same no one is denied "the equal protection of the laws."

The plaintiff also claims that the statutes and ordinances with reference to road or poll taxes are unconstitutional and void. It is claimed that they are void for various reasons: First, because they impose "involuntary servitude" upon persons not convicted of crime; second, because they provide for taking private property for public use without compensation; third, because they place an embargo upon the right to vote; fourth, because their provisions are such that they can be enforced only by a proceeding before the police judge, without a jury, and that no appeal can be taken from the decision of the police judge to a court with a jury, except by entering into a recognizance with security conditioned, among other things, for the payment of any fine and costs which might be adjudged against the appellant. Of course, work upon the roads or streets as provided for by these statutes and ordinances is "involuntary servitude," but it is not that kind of involuntary servitude which

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comes within the interdiction of section 6 of the bill of rights of the Kansas Constitution; or section 1, article XIII of the United States Constitution. It is like service or "involuntary servitude" on juries, or in the militia, or in the army, or in removing snow or ice from sidewalks, gutters, etc., and is not that kind of "involuntary servitude" which is akin to slavery, as the interdicted involuntary servitude mentioned in the State and Federal Constitutions is. Labor is also property; but it is not taken under these statutes or ordinances without compensation. Good public roads or streets are a sufficient compensation for the labor required to be performed by each individual in keeping them in good order and condition; and this labor, or the money paid in lieu thereof, is imposed and taken as an assessment or a tax, although it is not that kind of assessment or tax mentioned in section 1, article XI of the Kansas Constitution, and so far as compensation is concerned, the compensation in this case is just as good as the compensation in any case where persons are taxed. And although the assessment or tax in this case is levied and imposed only upon a class of persons, to-wit, males between twenty-one and forty-five years of age, still it is valid. Neither are the provisions of the foregoing statutes an embargo upon the right to vote; nor are they in contravention of those provisions of the Constitution with regard to the right of trial by jury. All these questions and others were involved in the case of *In re Dassler*, 35 Kans. 678; and upon all these questions the decision of this court in that case was against the claims made by the plaintiff in this case. We shall follow that decision. We shall add a few words however with regard to the question of the right of trial by jury. The Constitution provides that "the right of trial by jury shall be inviolate." Kans. Const., Bill Rights, § 5. This means that the right of trial by jury shall be and remain as ample and complete as it was at the time when the Constitution was adopted. But at that time parties who were charged with violating city ordinances, or with a failure to work on the streets of cities, were not entitled to a trial by jury. Hence this provision of the Constitution has no application to this case. But it is also claimed that under section 10 of the Bill of Rights of the Constitution, "in all prosecutions the accused shall be allowed * * * to have * * * a speedy public trial by an impartial jury. * * *." Now this claim is literally true; and yet it can hardly be supposed, and indeed it has never been supposed, that by this

provision of the Constitution all the summary remedies heretofore given or exercised in unimportant matters and before inferior courts, tribunals or magistrates, have been utterly obliterated and destroyed, and in their stead the more tardy, cumbrous and expensive remedy of trial by jury substituted. It is true that the words "all prosecutions" are used in this section, and yet we can hardly suppose that even the plaintiff will claim that the words "all prosecutions," as above used, mean all kinds of prosecutions, civil, criminal and military. Other words are also used in said section which tend to show that all kinds of prosecutions were not intended; for instance, the words "accused," "accusation," "offense" and "depend," are also used; and only accused defendants are given the right to "a speedy public trial by an impartial jury;" and this jury must be a "jury of the county or district in which the offense is alleged to have been committed." Cities, towns and villages are not mentioned in this section. Now if prosecutions for violations of city ordinances are to be tried only before a jury, at the election of the defendant, why should they not be tried only before a jury of the city? Why should city courts go beyond the city for jurors? And we might further say that at common law juries are always composed of twelve men; and such juries have seldom been allowed in courts of special, inferior or limited jurisdiction, such as police courts, justices of the peace or probate courts, or in courts of equity, or in reviewing courts. We suppose that the plaintiff will not claim that juries are required in all prosecutions, but only in all criminal or *quasi* criminal prosecutions. But will the plaintiff claim that juries are required before examining magistrates or in courts-martial, or in cases of impeachment before the legislature? We suppose not; but the plaintiff will undoubtedly claim that juries are required in all prosecutions before police courts or police magistrates for violations of city ordinances; for such is virtually the claim made in this case. But we do not think that even this claim of the plaintiff is tenable. In our opinion the words "all prosecutions," as used in section 10 of the Bill of Rights, were intended to mean only all criminal prosecutions for violations of the laws of the State and were not intended to mean or to include prosecutions for the violation of ordinary city ordinances which have relation only to the local affairs of the city. This is the view that almost every court of the United States which has had the subject under consideration, has taken concerning similar provisions in the Constitutions of their

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States. It is well settled that one and the same act committed by a person in a city may constitute two offenses—one against the laws of the State, and the other against the ordinances of the city; and both may be prosecuted against the offender. 1 Dill. Mun. Corp., § 368 *et seq.*, and note, and the numerous cases there cited. Now this could not be the case if the language of said section 10 was intended to include prosecutions for violations of city ordinances as well as for violations of the laws of the State; for that same section not only provides that “in all prosecutions the accused shall be allowed * * * to have * * * speedy public trial by an impartial jury, * * *” but it also provides that the accused shall not “be twice put in jeopardy for the same offense.” Hence if a prosecution for the violation of a city ordinance is as much a prosecution within the meaning of said section 10 as a prosecution for the violation of a State law, and if both kinds of prosecutions can be had for one and the same act, then the accused would as effectually “be twice put in jeopardy for the same offense” as if both prosecutions were had strictly and exclusively under the laws of the State. As lending support to the proposition that the words “all prosecutions,” used in section 10 of the bill of rights, were not intended to include prosecutions for violations of city ordinances, but were intended to include only prosecutions for violations of the laws of the State, we would refer to the following cases: *Dyers v. Commonwealth*, 42 Penn. St. 89; *Borough’s Appeal*, 52 Penn. St. 374; *Shafer v. Mumma*, 17 Md. 331; s. c., 79 Am. Dec. 656; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354; s. c., 58 Am. Dec. 559; *State v. Gutierrez*, 15 La. Ann. 190; *Pursell v. Porter*, 20 La. Ann. 325; *McGear v. Woodruff*, 33 N. J. L. 213; *Howe v. Treasurer*, 37 N. J. L. 145; *Trigally v. Memphis*, 6 Coldw. 382. See also 1 Dill. Mun. Corp., § 408 *et seq.*, and § 482, and notes and cases there cited. Also in this connection see the following cases: *Murphy v. People*, 2 Cowen, 815; *Boring v. Williams*, 17 Ala. 510; *Tims v. State*, 26 Ala. 165; *Work v. State*, 2 Ohio St. 296; s. c., 59 Am. Dec. 671; *Ewing v. Filley*, 43 Penn. St. 384; *Rhines v. Clark*, 51 Penn. St. 96; *Johnson v. Barclay*, 16 N. J. L. 1; *State v. Conlin*, 27 Vt. 318; *In re Dougherty*, 27 Vt. 325; *Vason v. City of Augusta*, 38 Ga. 542; *Frost v. Commonwealth*, 9 B. Monr. 362; *State v. McCorry*, 2 Blackf. 5; *Duffy v. People*, 6 Hill, 75; *Sill v. Corning*, 15 N. Y. 297; *People v. Daniell*, 50 N. Y. 274; *People v. Fisher*, 20 Barb. 652; *Prescott v. State*, 19 Ohio St. 184.

There are a few cases to be found in the reports which hold that constitutional provisions similar to those contained in section 10 of the Bill of Rights of the Kansas Constitution apply to such offenses against the laws of the State as existed at the time of the adoption of the Constitution, and not to subsequently-created offenses. Whether these cases are correct expositions of the law or not it is not necessary for us now to determine. But for the purposes of the case we shall assume that the provisions of said section 10 apply to all prosecutions for offenses against the laws of the State; without reference to whether such offenses or similar ones were in existence at the time of the adoption of the Constitution, or were subsequently created. Also for the purpose of this case we shall assume that if the State should permit cities to pass ordinances attempting to regulate matters not coming within the legitimate scope or purpose of municipal regulation, but coming more properly within the scope and object of State regulation, a person accused of violating such ordinances would have the right to demand a jury trial; for in such a case the prosecutions would to all intents and purposes be State prosecutions, and not merely city prosecutions; and the State could not by indirection do what it could not do directly. In other words, offenses against the public in general must be prosecuted for the public in general, and with a jury, if the defendant demand it, while offenses against the ordinances of a city, regulating only city affairs, may be prosecuted for the city and without a jury. Now this case belongs to the latter class of cases. Streets within a city or other strictly municipal corporation are peculiarly within the management and control of such corporation; they are graded, paved, curbed, guttered and kept in repair by the corporation, and not by the general public; and if they are permitted to become unsafe or dangerous, and injury to individuals results thereby, the corporation itself is liable; and this kind of liability is peculiar to municipal corporations. Neither the State, nor any county, township or road district is ever liable for injuries resulting from defective highways. Only municipal corporations proper are subject to such a liability, and therefore such corporations should have the fullest and most ample power for keeping their streets in good order and in a safe condition, and for this purpose they should have ample power to tax the people residing or holding property within the corporate limits, and to enforce the collection of such taxes. We think they have such power.

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We do not think that the plaintiff is entitled to any relief in this case, and therefore its petition will be denied.

All the justices concurring.

Petition denied.

MISSOURI VALLEY LIFE INSURANCE COMPANY v. MCCRUM.

(36 Kans. 146.)

Insurance — life — interest — assignment.

One who has no insurable interest in another's life cannot recover upon an insurance policy on such life, assigned to him by the insured and the beneficiaries.*

ACTION on a life insurance policy. The opinion states the facts. The plaintiff had judgment below.

T. A. Hurd, for plaintiff in error.

W. D. Webb, for defendant in error.

HORTON, C. J. The facts in this case are substantially as follows: On July 10, 1872, the Missouri Valley Life Insurance Company issued and delivered to Daniel Snyder its paid-up policy of insurance on his life, for the sum of \$502.65, payable to Elizabeth and Desylvia Snyder, his children, in sixty days after due notice and proof of his death. On June 12, 1883, Daniel Snyder and Elizabeth and Desylvia Snyder executed a written instrument of assignment on the back of the policy, as follows:

“TROY, KANSAS, *June* 12, 1883.

For value received, without recourse on me, I hereby sell and assign to C. M. Parker the within policy, and authorize her to receive, collect and receipt for any money that may be paid thereon.

“DANIEL SNYDER,

“ELIZABETH SNYDER,

“DESYLVIA SNYDER.”

“Witness: A. PERRY.”

The policy of insurance, with the written indorsement thereon, was, at the time of its execution, delivered to Mrs. C. M. Parker,

*To same effect, *Helmetag's Admr. v. Miller* (76 Ala. 183), 52 Am. Rep. 816.
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who paid a valuable consideration therefor. On November 14, 1883, Daniel Snyder died. After the death of Daniel Snyder, and prior to August 2, 1884, Mrs. Parker wrote the word "Cancelled" across the face of said assignment, on the back of the policy, and signed the same, "Cancelled.— C. M. PARKER." Mrs. Parker then delivered the policy to Elizabeth Snyder and Desylvia Kinsey, *nee* Snyder. On August 2, 1884, Elizabeth Snyder and Desylvia Kinsey executed another written instrument of assignment on the back of the policy, as follows:

"For value received we hereby sell and assign to Joseph McCrum the within policy, and authorize him to collect the same

"ELIZABETH SNYDER,

"August 2, 1884."

"DESYLVIA KINSEY."

At said time Elizabeth Snyder and Desylvia Kinsey delivered the policy of insurance with all the indorsements thereon to Joseph McCrum, who commenced this action in the court below to recover the amount of the insurance policy. Mrs. Parker was not in any way related to nor a creditor of Daniel Snyder. The proof of death of Daniel Snyder was presented on behalf of Mrs. Parker, about December 26, 1883, and this embraced the affidavits of Elizabeth Snyder and Desylvia Kinsey, and also the certificate of the physician who attended Daniel Snyder to the time of his death.

Under the circumstances we do not think that McCrum can recover under the policy. It was decided in *Insurance Co. v. Sturges*, 18 Kans. 93, that "a person who has no interest in another's life cannot purchase or take by assignment an insurance policy on such life. Such a thing would be clearly against public policy, and is not authorized by law."

To same effect are *Warnock v. Davis*, 104 U. S. 775; *Gilbert v. Moose*, 104 Penn. St. 74; *Ruth v. Katterman*, 112 Penn. St. 251; May Ins. (2d ed.), § 74.

The exact question now at issue was not passed upon in *Insurance Co. v. Sturges*, because in that case the insurance company only claimed the assignment was void. Mrs. Parker, who accepted the assignment and paid for the policy, had no insurable interest in the life of the assured, therefore the policy was not assignable to her; she took the policy solely for the purpose of speculation; the speculation was upon the life of the insured, and the sooner that was determined, the better the speculation; the policy so obtained was a mere wager and void. The sale and transfer thereof to Mrs. Parker

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by Elizabeth and Desylvia Snyder, the beneficiaries, was an attempted fraud upon the insurance company by which it was issued. After Mrs. Parker took the policy, if she could collect any thing thereon she was thereby directly interested in the early death of the insured. The insurance company issuing the policy did not intend it should reach or belong to any one directly interested in his death. The law will not permit a person thus interested to enforce a policy of insurance; all such speculation, or traffic in human life, independent of any statute, is condemned as being against public policy, and therefore not to be tolerated.

All the time Mrs. Parker had possession of the policy she believed that upon the death of the insured she would be paid the full amount thereof. All this time she was directly interested in the speedy death of the insured. This policy was placed in her possession, not only with the written consent of the beneficiaries, but upon a valuable consideration paid to them for the same; they therefore aided in creating, in the mind of Mrs. Parker, a desire for the early death of the insured; they held out to her the temptation to bring about the event insured against. Mrs. Parker was not successful in obtaining any money upon the policy, because she ascertained after the service of proof of death by her that it could not be collected in her hands, and therefore handed the same back to the beneficiaries. The law does not tolerate attempted frauds any more than it does those that are consummated. In making the transfer and assignment, and in receiving the money therefor, the beneficiaries, Elizabeth and Desylvia Snyder, were participants with Mrs. Parker in the attempted fraud upon the insurance company; the whole transaction between the beneficiaries and Mrs. Parker contravenes public policy, and the law leaves the parties as it found them. As Mrs. Parker cannot enforce the policy, and as the transfer and assignment of the policy to Mrs. Parker by the beneficiaries is against public policy and under the ban of the law, the beneficiaries ought not to be permitted to enforce the policy; their assignee, McCrum, stands in their shoes, and is entitled to no greater rights or privileges than they are.

If Mrs. Parker, before the death of the insured, had demanded from the beneficiaries the money that she had paid for the assignment, upon the ground that the sale to her was void, she could not have recovered. If the beneficiaries can now recover, they are doubly benefited by the questionable transaction in which they were

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engaged, first, by receiving the value of the policy from Mrs. Parker, and second, by receiving the value of the policy again from McCrum.

It was said in the case of *Gilbert v. Moose, supra*, that "So fraught with dishonesty and disaster, and so dangerous to even human life, has this life-insurance gambling become, that its toleration in a court of justice ought not for a moment to be thought of." If the party who attempts to speculate in human life cannot enforce the policy which he has purchased on the life of another, in whose life he has no insurable interest, the beneficiaries who knowingly and purposely sell and assign to such a person the policy on the life of another for a valuable consideration ought not thereafter to be permitted to enforce the same for their own benefit. If under all the facts of this case the beneficiaries, or their assignee, could recover, the law forbidding the assignment of policies of insurance to parties who have no insurable interest might be readily avoided. If Mrs. Parker had been a creditor of the insured for any sum, the assignment would have been a valid contract as security for the same, and upon the death of the insured the assignee could have collected any sum lent to or owed by the insured, and the balance would have belonged to beneficiaries or their assignee. Such a case is not presented.

Frank v. Insurance Co., is referred to as an authority that the beneficiaries can maintain an action upon the policy notwithstanding the assignment to Mrs. Parker. The courts of New York hold that a valid policy of insurance, effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled upon the death of the insured to the full sum, payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life, of the insured. *St. John v. Insurance Co.*, 13 N. Y. 31; s. c., 64 Am. Dec. 529; *Valton v. Assurance Co.*, 20 N. Y. 32. This court refused to follow the decisions of New York in *Insurance Co. v. Sturges*. The decision in *Frank v. Insurance Co., supra*, was rendered under a statute making a policy procured on the husband's life, for the benefit of the wife, unassignable. The validity of an assignment of a policy to one having no insurable interest in the life of the insured did not enter into the case; there was a want of power to assign. Therefore that case has no affinity with the one under consideration.

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Finally, it is insisted, as there is no claim in the answer of the insurance company that the assignment of the policy to Mrs. Parker was invalid, the insurance company had no right subsequently to urge that the assignment was worthless, or the policy non-enforceable, on account of such assignment. The issues of a case are made up from all of the pleadings. The amended reply of the plaintiff below stated that Mrs. Parker "had no insurable interest in the life of Daniel Snyder, and that the assignment to her was void." The question is whether upon the whole case, as presented, the plaintiff is entitled to recover. It is not for the sake of the insurance company that the transactions between the beneficiaries and Mrs. Parker are held wrongful, but such rule is founded on general principles of public policy forbidding speculative contracts upon human life. In all such cases the courts ought not to lend their aid to assist parties engaged in the perpetration or attempted perpetration of such wrongful speculations. *Hinnen v. Newman*, 35 Kans. 709; *Insurance Co. v. Sturges*, *supra*.

The judgment of the District Court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

Judgment reversed.

 BURTON v. LARKIN.

(35 Kans. 246.)

Contract—when third person not authorized to sue.

A contract by which B. agrees to furnish C. "necessary money to pay his current expenses," such money being a loan, does not authorize a person furnishing goods to C. to sue B. therefor, nor constitute C. the agent of B. as principal debtor.

ACTION for goods sold. The opinion states the case. The plaintiff had judgment below.

J. B. Johnson and J. D. McFarland, for plaintiff in error.

Lloyd & Evans, for defendant in error.

VALENTINE, J. This was an action brought by Arthur Larkin against Howes B. Clark and Oscar A. Burton for \$461.26, for

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goods, wares, merchandise and chattels alleged to have been sold and delivered by the plaintiff to the defendants. The action was tried by the court and a jury, and the court instructed the jury to find for the plaintiff, and the jury so found, assessing the amount of the plaintiff's recovery at \$469.46, and the court rendered judgment accordingly. To reverse this judgment, Burton, as plaintiff in error, brings the case to this court, making Arthur Larkin the defendant in error.

It appears that Burton is and has been for many years a resident of the State of Vermont, and at one time owned a large amount of real estate in Ellsworth county, Kansas; that Clark is his nephew; that Burton sold said real estate to Clark on credit, retaining the legal title in himself as a security for the purchase-money, and also at various times loaned Clark money for the purpose that Clark might cultivate the land and carry on the business of farming and stock-raising upon the same. Clark had a family, and he with his family resided upon the land. About once a year Burton and Clark had settlements of their affairs, and at each time entered into a new agreement, Burton at all times retaining the legal title to the land in himself, as a security for the payment of the purchase-money, and for the money advanced by him to enable Clark to carry on the aforesaid business. On November 22, 1883, they had a settlement and entered into a written agreement, similar to agreements previously entered into between them, whereby Clark agreed to pay Burton \$30,650, in such amounts and at such times as he could, with interest thereon at the rate of seven per cent per annum, and upon full payment Burton was to convey to Clark the aforesaid real estate. This agreement also contained some stipulations not necessary to mention. It also contained the following stipulation, which constitutes the only foundation for the present action as between Larkin and Burton, to-wit: "It is also agreed and understood that the said party of the first part (Burton) shall furnish said party of the second part (Clark) such sums of money as may be necessary to pay the current expenses of said second party, it being understood that said second party shall render a monthly account of expenses to said first party."

After this written agreement was made, and prior to the commencement of this action, which was on December 26, 1884, the goods, wares, merchandise and chattels for which this action was brought were sold and delivered by Larkin to Clark, and to Clark

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only. It is not claimed on the part of Larkin that they were in fact sold or delivered to Burton, or to any one at his instance or request, or that Burton received any benefit from them, or that the credit for the same was given to Burton, or that he in any manner became liable for them, except by reason of the aforesaid stipulation contained in the aforesaid written contract between Burton and Clark. It is claimed however that by virtue of this stipulation Burton is liable.

It is unquestionably true that in this State a person, for whose benefit a promise to another upon a sufficient consideration is made, may maintain an action on the contract in his own name against the promisor. *Anthony v. Herman*, 14 Kans. 494; *Harrison v. Simpson*, 17 Kans. 508; *Center v. McQuesten*, 18 Kans. 476; *K. P. Ry. Co. v. Hopkins*, 18 Kans. 494; *Floyd v. Ort*, 20 Kans. 162; *Life Assurance Society v. Welch*, 26 Kans. 641, 642; *Brenner v. Luth*, 28 Kans. 581. And this same doctrine prevails in many of the other States. It is said in a note to the case of *Shamp v. Meyer*, 24 Cent. L. J. 111, 112, as follows: "The rule that a third party, for whose benefit a contract was made may sue the promisor on the contract, though the promise was not made to him and the consideration did not move from him; seems to have met with approval in England at one time; but the contrary rule is now well established. The later English rule has been adopted by several American courts, but generally with the exception that where one receives money from another under promise to pay it to a third person, or where one owing money to another promises to pay it to a third person, such third person may sue on the contract. Yet where any contract is made for the benefit of one, a stranger to the contract, the weight of American authority is in favor of the rule which allows such third party to maintain an action on the contract, or advantage may be taken of it by way of set-off."

But there are limitations upon this rule, or rather, the rule is not so far extended as to give to a third person who is only indirectly and incidentally benefited by the contract a right to sue upon it. In the case of *Simon v. Brown*, 68 N. Y. 355, the following language is used: "It is not every promise made by one to another from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

We think this is a correct statement of the law. *Turk v. Ridge*, 41 N. Y. 201; *Garnsey v. Rogers*, 47 N. Y. 233; s. c., 7 Am. Rep. 440; *Merrill v. Green*, 55 N. Y. 270; *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195; *L. O. S. R. Co. v. Curtiss*, 80 N. Y. 219; *Dunning v. Leavitt*, 85 N. Y. 30; s. c., 39 Am. Rep. 617; *Sanders v. Filley*, 29 Mass. 554; *Johnson v. Foster*, 53 Mass. 167; *Greenwood v. Sheldon*, 21 Minn. 254; *Ferris v. Carson Water Co.*, 16 Nev. 44; s. c., 40 Am. Rep. 485; *Anderson v. Fitzgerald*, 21 Fed. Rep. 294; *National Bank v. Grand Lodge*, 98 U. S. 123. Of course the name of the person to be benefited by the contract need not be given if he is otherwise sufficiently described or designated. Indeed he may be one of a class of persons, if the class is sufficiently described or designated. In any case where the person to be benefited is in any manner sufficiently described or designated, he may sue upon the contract. But the present contract does not come within any of the rules authorizing a third person to sue upon it. It is substantially as follows: Burton agreed with Clark that he (Burton) would furnish to Clark such sums of money as might be necessary for Clark to pay his (Clark's) own future current expenses, not to pay any existing debt or obligation, nor indeed for Burton to pay any debt or obligation, present or future, except to Clark; nor for either to pay to any particular person or class of persons, except Burton to Clark; nor to pay for any particular article, or act, or thing; nor to pay or to do any other act or thing for the benefit of any particular person or class of persons, except Burton to Clark. Indeed the contract is solely between Burton and Clark, and solely for the benefit of these two persons, and not for the benefit of any other person or class of persons. Of course this contract, if every thing were to occur as was contemplated, might indirectly result to the benefit of others than Burton or Clark. But so might almost any contract result to the benefit of others than the parties thereto, and yet no cause of action in favor of third persons and against one of the parties to the contract could be founded upon any such indirect results. When the contract in the present case was entered into, no debt or other obligation existed in favor of Larkin and against either Burton or Clark, nor does it appear that it was contemplated by either Burton and Clark that any such debt should be created, or indeed that any debt to any person should be created. Probably, at the time when this contract was entered into, Larkin was

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not thought of, and probably also it was the intention of the parties that Burton should furnish the money to Clark, and that Clark should pay his current expenses as fast as he contracted them, and that he should never, under any circumstances, create any debt or debts or other obligation for such expenses to any person. But however this may be, it cannot be said in any aspect of the case that the contract was made for the benefit of Larkin within the meaning of the rule that permits third persons to sue upon contracts. The sums of money to be furnished by Burton to Clark were to be furnished as loans to Clark, and not to purchase any thing or to pay for any thing for Burton's benefit, except indirectly as follows: they were furnished to Clark to enable him to carry on Clark's own business, and thereby incidentally to preserve Burton's securities, for the payment of Clark's debts to Burton. As between Burton and Clark, Clark owed Burton many thousands of dollars, and Burton should not be compelled to pay Clark's debts. The debt sued for in the present case is purely Clark's debt.

It is further claimed, by counsel for Larkin, that "the contract between Burton and Clark really constituted Clark the agent of Burton, and Burton is liable as the principal debtor." We do not think that this claim is tenable at all. All the property, real and personal, belonged to Clark, although the legal title thereto was in Burton, to secure him for the amount which Clark owed him, and Clark had full and complete possession and control of the property, and it was also expressly stipulated in a chattel mortgage given by Clark to Burton at the time when said contract was entered into, that all the personal property should be taken care of by Clark at his own cost and expense, and Clark also resided upon the land, and had a family, for which a portion of his current expenses were incurred, and all the goods, wares, merchandise and chattels purchased by Clark from Larkin were purchased for Clark, and not for Burton, and the sums of money to be furnished by Burton to Clark were to be furnished as loans to Clark, and not to purchase any thing or to pay for any thing for Burton's benefit, except as aforesaid.

The judgment of the court below as between Burton and Larkin will be reversed, and the cause remanded for further proceedings.

Judgment reversed, and cause remanded.

All the justices concurring.

BRIGGS V. LATHAM.

(26 Kana. 235.)

Negotiable instrument — contract of indorsement — where made.

Where a payee indorses a note in one State, and the note is sold and delivered in another State, the contract of indorsement must be regarded as made in the place where the sale and delivery occurred.*

ACTION on promissory note. The opinion states the facts. The defendant had judgment below.

Ware & Ware, for plaintiff in error.

W. S. Coy, for defendant in error.

JOHNSTON, J. The findings of facts are unquestioned here, and must govern in the decision of the case. The only question presented for determination is, whether the indorsement of the notes by defendant is an Illinois or a Missouri contract. The notes were never protested, nor did the defendant ever receive notice of their non-payment, and this was her defense. Under the laws of Illinois, no protest or notice was necessary to fix the liability of the defendant as indorser; but the laws of Missouri, like our own, require protest and notice. We think that the law of Missouri must control. The indorsement was written by the defendant upon the back of the notes at her residence in Illinois, where she placed them in the hands of her husband for negotiation. This act did not operate to transfer the notes, nor did it complete the contract of indorsement. In *Edwards on Notes and Bills*, § 403, it is said that "The indorsement of a note or bill is not completed until the instrument is delivered to the indorsee or put under his legal control. Indeed it is not at all material when or for what purpose the indorsement is written, since it is the delivery of the paper properly indorsed that operates as a contract of indorsement." *Dan. Neg. Inst.*, § 868; 2 *Pars. Notes and Bills*, 327.

The mere circumstance that the defendant wrote her name on the notes in Illinois is therefore unimportant. They were placed in the hands of her husband to be negotiated and sold, not at any

* See *Wooley v. Lyon* (117 Ill. 244), 57 Am. Rep. 887.

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particular place nor to any particular person, but were to be disposed of by him wherever and to whomsoever he could. He carried them to Missouri, where he sold and delivered them to Dunbar. Until that time the notes were in the control of the defendant, and the transfer or contract of indorsement was not completed till then. The indorsement is a separate and substantive contract, and is not necessarily controlled either by the place of payment named in the notes, or by the residence of the indorser. The general rule is, that the contracts of this character are to be construed and their effect determined according to the laws of the State in which they are made, unless it appears that they are to be performed in or according to the laws of another State. In *Prentiss v. Savage*, 13 Mass. 22, PARKER, C. J., in commenting upon this rule, said that "It seems to be an undisputed doctrine, with respect to personal contracts, that the law of the place where they are made shall govern in their construction, except when made with a view to performance in some other country, and then the law of such country is to prevail."

The Supreme Court of Indiana, referring to the liability of the indorser, stated: "The indorser promises upon certain conditions, which are not expressed in the contract of indorsement, but which are implied by law, that he will pay the note, but not that he will pay it at the place named in the note for payment. His promise is general, for the payment of the note upon the implied conditions; and such general promise, not specifically to be performed elsewhere, is governed by the *lex loci contractus*, which must determine the conditions upon which he is to be held liable. *Hunt v. Standart*, 15 Ind. 33.

Judge Story supposes a case where a negotiable bill of exchange is drawn in Massachusetts, on England, and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored, the laws relating to damages in these States being different; and the inquiry is made, What rule is to govern with respect to damages? He says: "The answer is that in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn, and the successive indorsers are liable on the bill according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract." Story *Conf. Laws*, § 814.

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The authorities supporting this doctrine are uniform and numerous, a few of which may be cited: *Aymar v. Sheldon*, 12 Wend. 439; s. c., 27 Am. Dec. 137; *Smith v. Mead*, 3 Conn. 253; s. c., 8 Am. Dec. 183; *Blanchard v. Russell*, 13 Mass. 4; *Holbrook v. Vibbard*, 2 Scam. 465; *Cook v. Litchfield*, 9 N. Y. 279; *Trabus v. Short*, 18 La. Ann. 257; *Dow v. Rowell*, 12 N. H. 49; *Yeatman v. Cullen*, 5 Blackf. 240; Dan. Neg. Inst., §§ 867, 868.

The plaintiff contends that the fact that the parties to the indorsement were all residents of the State of Illinois, and the circumstances under which the transfer was made in St. Louis, take the case out of the general rule which we have been considering. It is urged that the parties were temporarily in Missouri, and being citizens of Illinois are presumed to have contracted with reference to the law of that State, with which they were familiar, and not according to the laws of Missouri, where they happened to be. We are referred to the case of *Van Zandt v. Arnold*, 31 Ga. 210, as an authority for this position. That was a case where the makers and indorsers of the note resided in Georgia, and the indorsements were made and delivered in Tennessee to the agents of the plaintiffs, who were residents of New York. It was claimed that it was a Tennessee contract, but the court ruled that it being known and understood that the indorsers resided in Georgia, and were in Tennessee for the sole purpose of effecting negotiations, and as a matter of convenience, and the plaintiffs' agent only happened to be in Tennessee at the time of the transfer, all the parties must be deemed to have contemplated Georgia as the place of performance and to be governed by its laws. Our attention is also called to a case supposed by Mr. Daniel in his work on Negotiable Instruments, section 876, of a business transaction between a Virginian and a Kentuckian, who were transiently in California, and the former should accept the bill of the latter, payable in the future, but not expressly at any particular place, and he raises the question whether it would be deemed a Virginia or a California acceptance. He says: "The criterion to apply would be whether or not the acceptance was to be paid in California or in Virginia. If the Virginian were *in transitu*, that is, merely there for a particular negotiation, or for convenience, or merely casually passing through the State without any local business established there, the single transaction would be governed by the law of his domicile, where it would be presumed he would be, and where it is presumable

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he would discharge his obligation at maturity; but otherwise the law of California would govern."

Judge Story says that some jurists have adopted the opinion that where a contract is made between foreigners belonging to the same country, who are not domiciled but are merely transient persons in the place where the contract is made, it ought to be governed by the laws of their own country. He then proceeds: "Without undertaking to say that the exception may not be well founded in particular cases as to persons merely *in transitu*, it may unhesitatingly be said that nothing but the clearest intention on the part of foreigners to act upon their own domestic law, in exclusion of the law of the place of the contract, ought to change the application of the general rule." Story Conf. Laws, § 273.

The facts of this case do not bring it within any of these or the other authorities cited by the plaintiff. It is true, the defendant and her husband, as well as Dunbar, to whom the notes were sold, were residents and citizens of Illinois, but there was nothing in the language of the indorsement, or in the circumstances of the case, to show that they contracted with reference to the laws of Illinois. L. D. Latham, husband and agent of the defendant, was a conductor on a railroad running into St. Louis, Missouri. That city was the end of his run and was also his headquarters. Dunbar was also a passenger conductor on a railroad and his route was from Louisiana, Missouri, through Illinois to St. Louis, Missouri. His head-quarters were in St. Louis, and he kept some of his valuable papers in a bank or safe-deposit in that city. They met in St. Louis, the head-quarters of both when not in charge of their trains, without any previous arrangement that they should so meet, and the notes were there transferred. They were not transiently in Missouri, nor did they go there for the sole purpose of making the contract, as was done in the Georgia case. Neither were they *in transitu*, or merely casually passing through the State of Missouri without a business established there, like the case supposed by Mr. Daniel. And as stated by Judge Story, "Nothing but the clearest intention on the part of foreigners to act upon their own domestic law in exclusion of the law of the place of contract ought to change the application of the general rule." Much of their time was necessarily spent in St. Louis, and in fact, that city may be said to have been their place of business. For several years before the transaction in question they had been

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engaged as conductors on railroads running into St. Louis, and during all that time they maintained business head-quarters there. In addition to this Dunbar kept his valuable papers in St. Louis instead of in Illinois, indicating that that was a place where at least some of his business was transacted. The contract of indorsement was actually made in Missouri, and under the circumstances mentioned, it cannot be said that it was made in contemplation of the Illinois law, or that the parties intended that it should be interpreted and their liability determined by the laws of a State other than that where the contract was entered into.

We think the conclusions reached by the court upon the facts found are correct, and judgment given will be affirmed.

All the justices concurring.

Judgment affirmed.

MOORE V. JORDAN.

(36 Kans. 271.)

Executor and administrator — foreign — conflict of laws — title to debts.

M., who was domiciled in Illinois, died intestate in Colorado while temporarily sojourning there, having with him notes given by parties domiciled in Kansas, and a mortgage securing them upon lands in Kansas. Letters of administration were taken out in Colorado by the widow, who there came into possession of the notes and mortgage. Letters of administration were also granted to a son of the intestate in Illinois, but the notes and mortgage never came into his possession. *Held*, that the administratrix could not maintain an action on the notes and mortgage in Kansas.*

ACTION upon promissory notes, and to foreclose a mortgage given to secure them. The opinion states the case. The defendant had judgment below.

Case & Moss, for plaintiff in error.

G. C. Clemens, for defendants in error.

JOHNSTON, J. This was an action to recover a debt evidenced by five promissory notes executed in favor of Horace Moore by the defendants, John S. Jordan and Helen J. Jordan, and to foreclose a mortgage which had been given by these defendants on lands in

* See *Lewis v. Adams*, ante, 423.

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Shawnee county, Kansas. The action was brought by Harriet Moore, as administratrix of the estate of Horace Moore, deceased, and she alleged that she was duly appointed and qualified under the laws of the State of Colorado. It was alleged that subsequent to the execution of the mortgage, John S. and Helen J. Jordan had conveyed their interest in the premises to the defendant, M. G. Coughlin. The defendants answered that they were residents of the State of Kansas, and have been domiciled in Kansas since and long prior to the death of Horace Moore. Among other defenses they allege that at the time of his decease Horace Moore was a resident of, and had his home and domicile in the State of Illinois, and was only temporarily sojourning in Colorado at the time of his death; that the notes and mortgage which came into the possession of the plaintiff are not, and never have been, assets in her hands; that according to law she has no interest in nor title to the notes and mortgage, nor to the proceeds thereof; no power to collect or receive any thing on account of them, or to release or acknowledge satisfaction thereof, and no right or authority to bring or maintain an action thereon in this State against the defendants.

It is further alleged that soon after the decease of Horace Moore, administration of his estate was duly granted to Newell H. Moore, in the county of Kendall in the State of Illinois, where the intestate resided at the time of his decease, and that Newell H. Moore qualified as administrator, and continues in the discharge of his duties as such, and that the defendants have fully settled with him all matters between said defendants and the estate, including the notes and mortgage. The written receipt of Newell H. Moore is set out in the answer.

The controverted question of fact to which the greater part of the evidence was directed, relates to the domicile of Horace Moore at the time of his death. Upon this question the jury found specially that at and immediately prior to the time of his death his residence and domicile were in Illinois, and not in Colorado. He had resided in Illinois for a great many years, but shortly before his death he made several visits to Colorado with his son, and for the benefit of his son's health. In company with his son he went to Colorado in February, 1879, and remained there until October of the same year, when he died intestate. He had acquired considerable property, the greater part of which was left in Illinois, but he took with him to Colorado the notes and mortgage in contro-

versy, where they were found at the time of his death. The testimony regarding his domicile was conflicting, and its sufficiency is challenged by the plaintiff in error, but the finding is not without support, and as the question was fairly submitted to the jury, we must regard the finding as conclusive here. Letters of administration were issued by the County Court of Arapahoe county, Colorado, to the plaintiff soon after the death of the intestate, authorizing her to administer upon the estate found in Colorado. Soon afterward letters of administration were granted to Newell H. Moore, in Illinois, and it appears that both of these administrators, the one in Colorado and the other in Illinois, qualified as required by the laws of these States respectively, and entered upon the discharge of their official duties. The notes and mortgage came into the possession of the plaintiff as administrator at Denver, Colorado, and were never in the possession of the opposing administration. What then is the legal effect of these facts? The court in its charge ruled, and we think correctly, that the notes and mortgage were not assets in the hands of the plaintiff, and that she could not maintain an action thereon under the authority conferred by the laws of Colorado. The right of the defendants to avail themselves of this defense, though questioned by the plaintiff, cannot be doubted. In an action brought by a foreign administrator in Wisconsin, upon a bond secured by mortgage on real estate situate there, the defendants set up as a defense that the plaintiff had no right to maintain the action, but that an administrator had been appointed under the laws of Wisconsin, which appointment vested in the latter all rights of action upon the bond. The Supreme Court of the United States held that the defense was good, saying: "The bond in suit was *bona notabilia* in Wisconsin, and a plea that the subject of the action constituting such *bona notabilia* was, on the death of the decedent, in another jurisdiction than the one which appointed the administrator suing as plaintiff, has always been a good answer to the action. It is an averment of facts which in law excludes all right to or control over the property in that State by the foreign administrator." *Noonan v. Bradley*, 9 Wall. 405; *Ins. Co. v. Lewis*, 97 U. S. 682.

The mere fact that the notes and mortgage chanced to be in Colorado does not give plaintiff title to them, nor make them assets in her hands. Prior to the death of the intestate, the notes had no fixed *situs*, but followed the domicile of the owner, wherever

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that might be. After his death they lost their transitory character and became local. The principal administration, to which all others are subordinate, is at the domicile of the intestate, and the universally recognized rule of law is that the succession to and distribution of personal estate is governed by the law of the place where the intestate was domiciled at the time of his death. "The original administrator therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased, for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue according to the law of the place or directions of the will, as the case may be." *Wilkins v. Ellett*, 9 Wall. 740; Story Conf. Laws, § 379.

However the letters of administration confer no authority beyond the limits of the State granting them. The title acquired by the administrator of the domicile is but a fiduciary one, and can only be enforced in another State by permission of its laws. No State is required under any rule to surrender the effects or debts due to an intestate domiciled elsewhere to the prejudice and injury of its own citizens. Although the title and right of the domiciliary administrator may be recognized *ex comitate*, it is subject to the rights of the creditors of the estate where the assets exist, or the debtor of the deceased resides. It would be very unjust to require creditors in this State to seek their remedy in another jurisdiction when there were assets here, and it is well settled that the creditors of each State are entitled to payment before the assets of the estate are withdrawn to another jurisdiction. Story Conf. Laws, § 512. So the rule has become established that debts, such as are evidenced by promissory notes, are *bona notabilia* at the domicile of the debtor. The Supreme Court of the United States epitomized the law on this question where it is said: "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives without regard to the place where the instrument is found or payable. *Wyman v. Halstead*, 109 U. S. 654; *Chapman v. Fish*, 6 Hill, 554; *Attorney-General v. Bouwens*, 4 M. & W. 171-.

191; *Owen v. Miller*, 10 Ohio St. 136; *Thompson v. Wilson*, 2 Conn. 291; *McCarty v. Hall*, 13 Mo. 480; *Willard v. Hammond*, 1 Fost. 382; *Shakespeare v. Fidelity Ins. Co.*, 97 Penn. St. 173; *Dial v. Gary*, 14 S. C. 573; s. c., 37 Am. Rep. 737; *Life Ins. Co. v. Woodworth*, 111 U. S. 138; 1 Williams Executors, 426.

The courts however are not entirely uniform in their holdings upon this question. Some of the authorities hold that the title to these evidences of debt is not only in the domiciliary administrator, but that they are assets in his hands instead of at the domicile of the debtor. *Eels v. Holder*, 2 McCrary, 622; *Speed v. Kelly*, 59 Miss. 47. The only conflict however is in regard to whether they are assets at the domicile of the intestate or at the domicile of the debtor. No authority to which our attention has been called holds that the mere fact that the evidences of debt happen to fall into the hands of an ancillary administrator, appointed at a place other than the domicile of the intestate or of the debtor, vests the title to the debt in him. The case mainly relied on by the plaintiff is *St. John v. Hodges*, 9 Baxt. 334. In that case the court uses some language tending to sustain the plaintiff's theory that the administrator in the jurisdiction, where negotiable notes are left at the time of the death of the decedent, has title to them, although the debtor resides elsewhere. It appears however that the notes were left at the domicile of the intestate, and they came into the possession of the administrator appointed in that jurisdiction, and the case therefore only sustains the title of the administrator at the domicile. In a later case the same court, referring to the decision in *St. John v. Hodges*, say that the question decided was that, "Notes are *bona notabilia* at the domicile of the intestate when left there at the time of his death, and that administration taken out in another State where the debtor resides does not draw thereto the title or the right to the notes unless they actually come to the hands of such administrator." *Goodlett v. Anderson*, 7 Lea. 289. *Stevens v. Gaylord*, 11 Mass. 267, is cited by the plaintiff, but it does not support her theory. It is there stated that, "If a foreigner or a citizen of any other of the United States dies leaving debts and effects in this State, these can never be collected by an administrator appointed in the place of his domicile, and we uniformly grant administration to some person here for that purpose. This is the rule of the common law, and it is adopted as we understand in most of the United States."

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By the authority of *Wyman v. Halstead*, *supra*, it is settled that neither the place of payment of simple contract debts like promissory notes, nor the place where they happen to be found, is important or controlling. It has been decided that payment to an administrator appointed in the State in which the intestate had his domicile at the time of his death is good against any administrator appointed elsewhere. *Wilkins v. Ellett*, 9 Wall. 740; *Wyman v. Halstead*, 109 U. S. 656. And it has been held in this State that in the absence of any opposing administration, the courts in this State, *ex comitate*, will recognize the title and possession of personal property in this State in an administrator appointed in the domicile of the decedent, and that payment to such an administrator of a debt due to the decedent will be good. *Denny v. Faulkner*, 22 Kans. 96. If there are no creditors outside of the domicile of the intestate, debtors of the estate elsewhere might make settlement with the principal administrator and secure a full discharge of the debt, but they cannot obtain a valid release from an ancillary administrator appointed in a jurisdiction other than where the debtor resides. The only authority possessed by the plaintiff was derived from the law of Colorado, and her administration was subsidiary to the administration in Illinois. It does not appear that there were any debts due from the estate in Colorado, but the extent of her authority was to administer upon the assets of the estate locally situated there, and after paying the creditors in that jurisdiction, to remit the residue to the principal administrator in Illinois. We have a statute permitting a foreign administrator to sue in this State, but this statute only removes his disability to sue upon any cause of action he may have. It does not enlarge his rights, nor confer upon him a title to the debts which he would not otherwise own. As we have seen, the notes were not *bona notabilia* in Colorado, and the plaintiff, being an ancillary administratrix, cannot be allowed to draw into her jurisdiction debts due the estate from persons outside of Colorado, and if there are creditors in that State they must share with others in the residue remitted to the administrator at the domicile. 3 Redf. Wills, 28; *Baldwin's Appeal*, 81 Penn. St. 441. Under our statute an administrator of this estate may be appointed in Kansas who can maintain an action to recover any debts due to the estate from persons resident here, and after the local creditors are paid, if any exist, the surplus, if any, should be paid to the administrator in Illinois. Gen. Stat., ch. 37, § 174.

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But in no view of the case has the plaintiff under her appointment any authority to maintain this action.

Some other questions were raised and discussed by the plaintiff in error, but in view of the conclusion that we have reached, it is not necessary to consider them. The judgment of the District Court must be affirmed.

All the justices concurring.

Judgment affirmed.

STATE V. WALKER.

(36 Kans. 207.)

Marriage — validity — statutory requirements — misdemeanor.

The mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient to constitute marriage at common law, but in Kansas the legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and prescribe penalties against those who solemnize or contract marriage contrary to statutory command.

Punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void.

Under section 13 of the marriage act, all persons who enter the marriage relation and live together as man and wife, without complying with the conditions and regulations of the act, are guilty of a misdemeanor, and subject to the punishment imposed by that section.

CONVICTION of violation of marriage law. The opinion states the facts.

Conviction of E. C. Walker and Lillian Harman for a violation of section 12 of the marriage act, which is as follows:

“That any person living together as man and wife within this State, without being married, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than five hundred nor more than one thousand dollars, or be imprisoned in the county jail not less than thirty days nor more than three months.” Comp. Laws of 1879, chap. 61, § 12.

At the trial, Moses Harman, the father of Lillian Harman, testified that on September 19, 1886, his daughter Lillian and E. C. Walker entered into what he called an “autonomistic marriage” at his home, in the presence of himself and two other per-

sóns. On that occasion a statement concerning the compact or union about to be entered into was read by the witness; then followed a statement made by E. C. Walker, which was responded to by Lillian Harman, and the ceremony was terminated by another short statement from the witness. These statements were published in the *Lucifer*, a newspaper edited by the witness, and the account there given was read in evidence, and is as follows:

“AUTONOMISTIC MARRIAGE PRACTICALIZED.

“While distinctly denying the right of any citizen or citizens, whether minority or majority, to inquire into our private affairs, or to dictate to us as to the manner in which we shall discharge our private duties and obligations to each other, we wish it understood that we are not afraid nor ashamed to let the world know the nature of the civil compact entered into between Lillian Harman and Edwin C. Walker, at the home of the senior editor of *Lucifer*, on Sunday, the 19th of September, 1886, of the common calendar. As our answer then to the many questions in regard thereto, we have reproduced, as near as possible, the aforesaid proceedings.

“M. Harman, father of Lillian Harman, one of the parties to this agreement or compact, read the following as a general statement of principles in regard to marriage: ‘Marriage—by which term we mean the various attractions, sentiments, arrangements and interests, psychical, social, material, involved in the sex-relations of men and women—is, or should be, distinctively a personal matter, a strictly private affair. There are or should be but two parties to this arrangement or compact—a man and a woman; or perhaps we should say a woman and a man, since the interests, the fate of woman is involved, for weal or woe, in marriage, to a far greater extent than is the fate or interests of man. Some one has said, ‘Marriage is for man only an episode, while for woman it is the epic of her life.’ Hence it would seem right and proper, that in all arrangements pertaining to marriage, woman should have the first voice or control. Marriage looks to maternity, motherhood, as its most important result or outcome, and as Dame Nature has placed the burden of maternity upon woman, it would seem that marriage should be emphatically and distinctively woman’s work, woman’s institution.

“‘It need not be said that this is not the common, the popular, and especially the legal view of marriage. The very etymology

itself of the word tells a very different story. Marriage is derived from the French word *mari*, meaning the 'husband,' and never did the etymology of a word more truly indicate its popular and legal meaning than does the etymology of this one. Marriage, as enforced in so-called Christian lands, as well as in most heathen countries, is preëminently man's affair, man's institution. Its origin (mythologic origin) declares that woman was made for man, not man for woman, not each for the other. History shows that man has ruled over woman as mythology declares he should do, and the marriage laws themselves show that they were made by man for man's benefit, not for woman's. Marriage means or results in the family as an institution, and the laws and customs pertaining thereto make man the head and autocrat of the family. When a woman marries she merges her individuality as a legal person into that of her husband, even to the surrender of her name, just as chattel slaves were required to take the name of their master.

"Against all such invasive laws and unjust discrimination, we, as autonomists, hereby most solemnly protest. We most distinctly and positively reject, repudiate and abjure all such laws and regulations, and if we ever have acknowledged allegiance to these statute laws regulating marriage, we hereby renounce and disclaim all such allegiance.

"To particularize and recapitulate: Marriage, being a strictly personal matter, we deny the right of society, in the form of church and State, to regulate it, or interfere with the individual man and woman in this relation. All such interference, from our standpoint, is regarded as an impertinence, and worse than an impertinence. To acknowledge the right of the State to dictate to us in these matters is to acknowledge ourselves the children or minor wards of the State, not capable of transacting our own business. We therefore most solemnly and earnestly repudiate, abjure and reject the authority, the rites and ceremonies of church and State in marriage, as we reject the mummeries of the church in the ceremony called baptism and at the bedside of the dying. The priest, or other State official, can no more prepare the contracting parties for the duties of marriage than he can prepare the dying for life in another world. In either case the preparation must be the work of the parties immediately concerned. We regard all such attempts at regulation on the part of church and State as not only an imper-

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tinence, not only wrong in principle, but disastrous to the last degree in practice. Here, as everywhere else in the realm of personal rights and reciprocal duties, we regard intelligent choice — untrammelled voluntarism — coupled with responsibility to natural law for our acts, as the true and only basis of morality.

“ ‘As a matter of principle we are opposed to the making of promises on occasions like this. The promise to ‘love and honor’ may become quite impossible of fulfilment, and that from no fault of the party making such promise. The promise to ‘love, honor and obey so long as both shall live,’ commonly exacted of woman, we regard as a highly immoral promise. It makes woman the inferior, the vassal of her husband, and when from any cause love ceases to exist between the parties this promise binds her to do an immoral act, viz.: It binds her to prostitute her sex-hood at the command of an unloving and unlovable husband.

“ ‘For these and other reasons that will readily suggest themselves, we, as autonomists, prefer not to make any promises of the kind usually made as part of marriage ceremonies.’”

E. C. Walker, as one of the contracting parties, made the following statement: “This is a time for clear, frank statement. While regarding all public marital ceremonies as essentially and ineradicably indelicate, a pandering to the morbid, vicious and meddling element in human nature, I consider this form least objectionable; I abdicate in advance all the so-called ‘marital rights’ with which this public acknowledgment of our relationship may invest me. Lillian is, and will continue to be, as free to repulse any and all advances of mine as she has been heretofore. In joining with me in this love and labor union, she has not alienated a single natural right. She remains sovereign of herself, as I of myself, and we severally and together repudiate all powers legally conferred upon husbands and wives. In legal marriage, woman surrenders herself to the law and to her husband, and becomes a vassal. Here, it is different; Lillian is now made free.

“In brief, and in addition: I cheerfully and distinctly recognize this woman’s right to the control of her own person, her right and duty to retain her own name, her right to the possession of all property inherited, earned or otherwise justly gained by her, her equality with me in this copartnership, my responsibility to her as regards the care of offspring, if any, and her paramount right to the custody thereof, should any unfortunate fate dissolve this union.

And now, friends, a few words especially to you: This wholly private compact is here announced, not because I recognize that you, or society at large, or the State, have any right to inquire into or determine our relations to each other, but simply as a guarantee to Lillian of my good faith toward her. And to this I pledge my honor."

Lillian Harman then responded as follows: "I do not care to say much; actions speak more clearly than words, often. I enter into this union with Mr. Walker of my own free will and choice, and I agree with the views of my father and of Mr. Walker as just expressed. I make no promises that it may become impossible or immoral for me to fulfill, but retain the right to act always as my conscience and best judgment shall dictate. I retain also my full maiden name, as I am sure it is my duty to do. With this understanding I give to him my hand in token of my trust in him and of the fidelity to truth and honor of my intention toward him."

Then M. Harman said: "As the father and natural guardian of Lillian Harman, I hereby give my consent to this union. I do not 'give away the bride,' as I wish her to be always the owner of her person, and to be free always to act according to her truest and purest impulses, and as her highest judgment may dictate."

It was expressly admitted that no license for the marriage of the defendants had been obtained, and that no marriage ceremony was performed by any judge, justice of the peace or licensed preacher of the gospel, and that neither of the defendants belonged to the Society of Friends or Quakers. The proceedings mentioned were followed by the matrimonial cohabitation of the defendants.

G. C. Clemens and David Overmyer, for appellants.

W. F. Giluly, county attorney, and S. B. Bradford, attorney-general, for State.

JOHNSTON, J. The questions to be determined upon this appeal arise upon an instruction given to the jury upon the trial, in which it was said that "If the defendants, at the time alleged in the information and in this State, agreed to live together as husband and wife, without having a license to be married, and without having a marriage solemnized by a judge, justice of the peace or licensed minister of the gospel, and in pursuance of such agreement lived

together in this county, they would be guilty of the offense charged in the information."

The instruction is founded upon the Marriage Act, and the manifest theory of the court is that the law of Kansas has provided rules regulating the marriage contract, and has prescribed a penalty or punishment for those who live together as man and wife without observing its requirements. In behalf of the appellants it is urged that what was said and done by them was sufficient to constitute marriage at common law. It is claimed that the formalities prescribed by statute are not essential to the validity of the marriage, and that as the contract of marriage between the defendants was not void, they are not punishable for failing to observe the statutory requirements in entering into the marriage contract, and that therefore the instruction given is erroneous. The correctness of the instruction depends upon the proper interpretation of the Marriage Act. The first section of the act provides that a marriage contract shall be considered in law as a civil contract, to which the consent of the parties is essential, and that the ceremony may be regarded either as a civil ceremony or as a religious sacrament, but it provides that "the marriage relation shall only be entered into, maintained or abrogated as provided by law." The second section provides that certain degrees of consanguinity shall be an impediment to marriage, and all marriages within the forbidden degrees of consanguinity are declared to be incestuous and void. The third section declares that all persons who contract, license or solemnize an incestuous marriage shall be guilty of a misdemeanor and subject to fine and imprisonment. The fourth section declares a penalty against any person who shall join others in marriage before a license has been issued by the probate judge. The fifth section provides that the probate judge shall issue a license to all persons legally entitled to the same upon application, and prescribes the form of the license. In the sixth section the probate judge is required to make a record of the licenses issued by him, as well as of the return indorsed upon the license by the person performing the marriage ceremony, and states the fee to which he is entitled. The seventh section visits a penalty upon the probate judge who refuses or neglects to issue a license to a person legally entitled thereto, when application is made, or who neglects to make a record of the license issued, or the return indorsed thereon. The eighth section empowers the probate judge to administer oaths and ex-

amine witnesses with reference to the right of persons who apply to him for license to assume the marriage relation, and also prescribes a penalty for issuing a license to persons not legally entitled thereto. The ninth section provides that marriages contracted outside of this State, and which are valid when contracted, shall be deemed valid in this State. The tenth section provides that every judge, justice of the peace or licensed preacher of the gospel may perform the marriage ceremony in this State, and shall certify on the back of the license the fact of the marriage and the date thereof, and cause the license to be returned to the probate judge within thirty days. To that section is added a proviso that marriages solemnized among the Society of Friends or Quakers in accordance with their forms and usage shall be good and valid, and shall not be affected by the provisions of the marriage act. The eleventh section provides that the books of record of marriage licenses, and the entries therein certified to by the probate judge, under his official seal, shall be evidence in all courts. The twelfth section, and the one under which this prosecution is brought, provides that "any persons living together as man and wife within this State, without being married, shall be deemed guilty of a misdemeanor," etc. And the thirteenth section provides that all records heretofore kept relating to marriages shall be delivered to the probate judge in the county within thirty days after the taking effect of the act.

It is palpable that the leading idea and purpose of this act is to compel publicity, and to require a record to be made of the marriages contracted in Kansas. By the terms of the act, marriage is declared to be a civil contract, the essential feature of which is the consent of the parties. No particular ceremony or form of solemnization is prescribed or required. The settled doctrine of the law, to be applied in a case where the validity of a marriage is drawn in question, is that in the absence of all civil or statutory regulations, the mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient without any formal solemnization. Such a contract constitutes a marriage at common law, and its validity will be sustained unless some statute expressly declares it to be void. *Meister v. Moore*, 96 U. S. 76; 1 Bish. Mar. & Div., §§ 279, 280, 283 *et seq.*, and numerous cases there cited. It may also be conceded to be well established that marriage, being a natural right and existing before the statutes, is favored by the

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law, and that all statutory regulations, if the language will permit, are to be construed as merely directory. "The doctrine has become established in authority that a marriage good at the common law is good notwithstanding the existence of any statute on the subject unless the statute contains express words of nullity." 1 Bish. Mar. & Div., § 283. It is also true that according to the terms of the Marriage Act, the only marriage contracts declared to be void are those entered into between persons closely allied in blood, which are everywhere prohibited. No such relationship existed between the defendants, nor is it shown that there was any impediment to their marriage. The penalties, inflicted by other provisions of the statute upon officers and those who fail to observe the required formalities, do not necessarily render a consensual marriage void, but this does not meet the charge against the defendants, nor render erroneous the instruction of the court. If the question involved in the case was whether the marriage was void or voidable, or if the legitimacy of children were in question, the argument of the defendants would be more applicable; and yet we are not prepared to say that the contract between the defendants is a common-law marriage. The question actually presented is, whether the legislature intended to inflict punishment on those who entered the marriage relation without observing the statutory regulations. The legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and a provision making it an offense and punishing those who solemnize or contract marriage contrary to statutory command is within legislative authority. Punishment may be inflicted on those who enter the marriage relation in disregard of the prescribed statutory conditions without rendering the marriage itself void. In *Teler v. Teler*, 101 Ind. 129; s. c., 51 Am. Rep. 742, the Supreme Court of Indiana, while holding that ceremonial rites are not indispensable, and that the intention to assume the relation of husband and wife, attended by pure and just motives, and accompanied by an open acknowledgment of that relation is sufficient to constitute marriage, stated that "persons may be punished for not obtaining licenses to marry, or for not taking steps to secure a proper record of the marriage, but there may nevertheless be a valid marriage."

Mr. Bishop says, that "this rule seems not to be peculiar to the common law. It exists also in Sicily, so in Scotland, where marriages contrary to the forms established by law are very frequent, and

no question remains as to their validity, the law imposes severe penalties upon the parties, the celebrator and the witnesses." 1 Bish. Mar. & Div., § 287.

This in our opinion is the legislative purpose and expression in enacting section twelve of the Marriage Act. The provision imposing a penalty upon those who live together as man and wife without being married is a part of the Marriage Act, wherein it is provided how marriage contracts may be entered into and solemnized. In the first section of the act it is provided that the marriage relation shall only be entered into in the manner provided by law. It proceeds to state what the manner is, and then prescribes penalties that are to be visited on all who disregard the rules laid down.

It is to be observed that the law relating to marriage was changed in 1867, at which time the words were added to the first section that "The marriage relation shall only be entered into, maintained, or abrogated, as provided by law." At the same time, the twelfth section was added, providing the punishment which the defendants are now seeking to escape. These changes were not idly made, but were manifestly intended to compel the compliance with the formalities and conditions prescribed. It is evident from the penalties imposed, that the legislature deemed the enforcement of the statutory regulations as important and beneficial, not only to the parties contracting marriage, but to society at large as well. The probate judge is to be punished if he issues a license to those not entitled to one. Magistrates and ministers of the gospel are forbidden under heavy penalties to marry persons before a license has been obtained, and the probate judge is declared guilty of an offense if he fails to properly record the license and the return thereon. By these and other penalties the legislature undertook to prevent the officers and ministers from authorizing or solemnizing marriages where the conditions and formalities of the statute have not been observed. The same idea is further carried out in the twelfth section, by visiting a punishment upon the parties themselves for failing to conform to the rules prescribed. The legislature directs how parties may be married, and then declares a punishment against them for living together as man and wife without being married, as the law provides. It is true that the penalty is directed against those who live together as man and wife "without being married." These words, we think, refer to those who assume the marriage relation without being married in the manner

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and upon the conditions in accordance with which the legislature has declared marriage should be contracted. When persons who are permitted to marry "live together as man and wife," it may be taken as an expression of consent, and consent under the circumstances is sufficient, as we have seen, to constitute a marriage at common law. It was certainly not intended that persons guilty of bigamy or adultery, nor persons who intermarry or cohabit with each other that are within the forbidden degrees of consanguinity, nor yet that a man or woman (one or both of whom are married) who shall abide or cohabit with each other, should be prosecuted and punished under this provision, as those offenses are defined and the punishment declared in the Crimes Act. Gen. Stat., chap. 31, art. 7. Under that act severe punishment is measured out to those who marry or live together as man and wife where there is a legal impediment to their marriage. For these offenses there is a maximum punishment prescribed of from five to seven years' imprisonment, while a conviction under the provision of the Marriage Act, which we are considering, subjects the parties to a mere fine, or to imprisonment in the county jail not more than three months.

The exception made by the statute in regard to marriages solemnized among the Society of Friends or Quakers lends support to the view which we have taken. Marriage with them is based on consent publicly declared in one of their meetings, and has all the elements necessary to make it good at common law. According to the defendant's theory, they would not be liable to the penalty written in section twelve, because marriage celebrated in accordance with their usage is valid at common law. But to relieve them from complying with the formalities of the statute, and to exempt them from the penalty provided, the legislature deemed it necessary to except their informal marriages from the operation of the act.

The argument made, that to require an observance of the statutory regulations trenches upon the liberty of conscience guaranteed by the Constitution, is not sound. Although marriage is generally solemnized with some religious ceremony, it is not under the control of ecclesiastical or religious authority. No religious rite or ceremony is prescribed. The intervention of a preacher or priest is not essential, and no religious qualification is required. So careful was the legislature to guard against any such invasion, that no particular form of ceremony is prescribed, and in the first section

of the act it is declared that the ceremony may be regarded either as a civil ceremony or as a religious sacrament. The regulations prescribed are neither burdensome nor unreasonable. These parties may go before a probate judge and obtain a license for a nominal fee, and there, in his presence, and without further rite or ceremony, perfect the marriage by declaring that they take each other for man and wife. The so-called "mummeries of the church," against which the defendants so strenuously object and protest, may be wholly omitted, and they may be married in as plain and matter-of-fact manner and with as short and simple a ceremony as can be desired, by a justice of the peace or other magistrate. It cannot be doubted that the purpose of the statutory regulations is wise and salutary. They give publicity to a contract which is of deep concern to the public, discourage deception and seduction, prevent illicit intercourse under the guise of matrimony, relieve from doubt the *status* of parties who live together as man and wife, and the record required to be made furnishes evidence of the *status* and legitimacy of their offspring. In the accomplishment of this purpose it was just as necessary to provide a penalty against parties who contract marriage in disregard of the rules prescribed, as against officers and ministers, who only perform a minor part in the proceedings, and we have no doubt that this was the legislative intention in the enactment of section twelve of the Marriage Act. We see no reason to declare the act invalid, and finding no error in the record, we must affirm the judgment of the District Court.

Judgment affirmed.

HORTON, C. J. (concurring). Upon the record as presented to us, the question, in my opinion, for consideration is, not whether Edwin C. Walker and Lillian Harman are married, but whether in marrying, or rather in living together as man and wife, they have observed the statutory requirements. The language of the statute is: "The marriage relation shall only be entered into, maintained or abrogated as provided by law," and "Any persons living together as man and wife within this State, without being married, shall be deemed guilty of a misdemeanor." Comp. Laws of 1879, chap. 61, § 12. My construction of these provisions is that a ceremonial marriage must be celebrated in conformity therewith, and that any persons living together as man and wife, without being married according to these directions, are liable to the penalty

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thereof. I do not say, nor do I intend to intimate, that a "consensual marriage" is not valid, but the legislature has the right to require parties assuming the marriage relation to have the marriage entered into publicly and a record made of the same. This, I think, is the purpose of the statutory regulations.

Whatever commands the State may give respecting a formal marriage, the courts usually hold a marriage at common law to be good, notwithstanding the statute, unless it contains express words of nullity; yet persons who marry without conforming to the statutory regulations may be punished, although the marriage itself be valid. The consequences of marriage as to conjugal rights and the rights of heirs are so momentous that the interests of society may properly require a witness to the marriage, and a record of its acknowledgment; thus much is required in the acknowledgment and registration of an ordinary conveyance of real estate. If there be no registration, no officiator, and no eye-witness of the marriage, the woman is placed at the mercy of the man, who may deny the "consensual relation" and repudiate her, and on the other hand a man may be blackmailed by an adventuress, who may declare there was a "consensual marriage" when there was none; therefore the statute requiring the registration and acknowledgment of marriage is for the benefit of the parties as well as their heirs. No man who desires in good faith to make a woman his wife will object to obtaining a marriage license, going before some person authorized to perform the marriage ceremony, and acknowledging the marriage. The fees for a marriage license and its return are only \$2. The acknowledgment of the marriage relation may be made for a trifling sum unless the parties voluntarily donate a liberal fee.

As a rule I do not think that any woman, who has reached the years of discretion and has a full appreciation of the marriage relation, will demur when it is proposed to clothe her matrimonial association with the forms of law. If the man objects to having his marriage public, he tacitly admits that he intends to cheat her whom he has privately promised to make his wife. It is only just that the acknowledgment and registration of the marriage relation should not be left to the whim and caprice of the parties because no transaction in the life of a man or a woman is more important or fraught with more significant consequences, and society is supremely interested in having a marriage entered into publicly and to have a record thereof.

But counsel claim that Edwin O. Walker and Lillian Harman should not be imprisoned on account of their non-observance of the statutory provisions regarding marriage, upon the ground that the statute "is an interference with their conscience" and therefore unconstitutional. Bill of Rights, § 7. The assertion that the acknowledgment and registration of a marriage conflicts with any right of conscience is wholly without foundation. The provisions of the act relating to marriage no more infringe the State Constitution than does the law regulating the acknowledgment and registration of real estate conveyances, chattel mortgages, etc.; in fact but little more ceremony is required for the one than for the other. The statute does not demand that the marriage ceremony shall be regarded as a religious sacrament; no recognition of the pope, or the church of Rome, or any minister, priest, church, religion or superstition is required; no intervention of a person in "holy orders" is requisite. The marriage does not have to be celebrated in any church, chapel, or other religious or public edifice. A probate judge or a justice of the peace may solemnize the marriage, and this may be done at the home of the parties, in the office of the official, or any other place the parties may select. The ceremony, if the parties so desire, may consist in the simple presentation to the official of the marriage license and a request that he take cognizance of the mutual engagement of the parties to assume the marriage relation. No special form or solemnization is prescribed or demanded.

Instead of permitting the man, as in olden times, to go to the house where his betrothed resides and lead her away to his own house and call her his wife and live with her as his wife, the statute requires the man and wife, if they are to live together in the marriage relation, to obtain a license at the office of the probate judge and have their mutual engagement acknowledged before some authorized person. The license after the marriage is to be returned to the office of the probate judge, and the registration thereof becomes public. If the parties in this case preferred to enter into the marriage relation without any religious or other elaborate ceremony, they could have done so within the terms of the statute by obtaining a license and going quietly before some justice of the peace and had their marriage relation there witnessed and acknowledged. They might have had as much ceremony or as little as they chose.

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I cannot understand how the provisions of the statute can be truthfully denounced a "monstrosity," or in what way the "sacred liberty" or "the personal rights" of the parties are infringed. If Lillian Harman desires to retain her own name, I can perceive no objection to her doing so. There is nothing in the statute justifying a man in being guilty of cruelty, or other inhuman or brutal conduct toward his wife, and the wife does not merge her individuality as a legal person in that of her husband.

The Constitution and statutes of Kansas are very liberal in recognizing the rights and privileges of women. Marriage involves neither the assumption of indebtedness nor the acquisition of property; a married woman may contract and be contracted with concerning her separate real and personal property, sell, convey and incumber the same; sue and be sued with reference thereto, in the same manner, and to the same extent, and with like effect, and as freely as any other person may in regard to his or her real or personal property. She may purchase personal property from her husband, perform labor and services on her sole and separate account, and make the earnings therefrom her sole and separate property; she has the same control of her person and property as her husband; she has the same rights as to the nurture, education and control of her children, and also the same rights in the possession of the homestead. *Knaggs v. Mastin*, 9 Kans. 532; *Tallman v. Jones*, 13 Kans. 438; *Going v. Orns*, 8 Kans. 85; *Larimer v. Kelley*, 10 Kans. 298; *Butler v. Butler*, 21 Kans. 526; s. c., 30 Am. Rep. 441. She may participate in all city elections, attend caucuses, nominate candidates, and vote for such persons and principles as her judgment dictates. In fact in Kansas a woman is in nearly all matters accorded civil and political equality with man; she is not his servant nor his slave. Here, the sexes may harmonize in opinion, and co-operate in effort; here, woman is no longer subordinate to man, but the two are co-ordinate together; here, the burden of a common prejudice and a common ignorance against woman has been wholly removed; here, the tyranny which degrades and crushes the wives and mothers in other countries, no longer exists; here, the coveted rewards of life forever, forbidden them in some of the States, are within their reach; here, a fair field for their genius and industry is open, and womanhood, with the approbation of all, may assert its divinely-chartered rights, and fulfill its noblest duties.

If Edwin C. Walker and Lillian Harman are suffering imprisonment, it is because they have willfully and obstinately refused to conform to the simple and inexpensive regulations of the statute directing marriage. In their non-observance of these regulations they have exhibited neither good sense nor sound reason. For purposely and publicly defying the law enacted for their benefit and the benefit of their offspring, if they shall have any, they are now punished; and if they persist in the future in living together as man and wife without complying with the statute, they deserve and undoubtedly will receive, further punishment, if criminal proceedings be instituted against them. They can at any time easily procure a license to marry, go before an officer and acknowledge their marriage; and then they will become, within all of the terms of the statute, husband and wife. Then over their union there can be no contention. Then the wife may be to the husband, in law and in deed,

"A guardian angel o'er his life presiding,
Doubling his pleasures, and his cares dividing."

VALENTINE, J. I concur in the judgment of affirmance. I do not believe that E. C. Walker and Lillian Harman were married in any sense. In my opinion, their lengthy and prolix ceremony at the time of forming their questionable union did not meet the necessary requirements of the law, either statutory or common, to establish a valid marriage. It is true, where a license is obtained and the parties are competent to marry each other, a bare acknowledgment before a judge, a justice of the peace, or a licensed preacher of the gospel, that they in the present assume the marriage relation, is all that is necessary to constitute a valid marriage. But none of these things were done in the present case. I shall also assume that aside from the statutes, but in accordance with the common law, a valid consensual marriage may be created in Kansas. In other words, the mere living together as husband and wife of a man and a woman competent to marry each other, with the honest intention of being husband and wife so long as they both shall live, will constitute them husband and wife and create a valid marriage. But that is not this case. In the present case the parties repudiated nearly every thing essential to a valid marriage, and openly avowed this repudiation at the commencement of their union. They avowed, among other things, that they would not be governed by the laws of the State or of so-

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ciety upon this subject, but would be governed only by their own notions of right and propriety. They announced in effect that they "repudiated all powers legally conferred upon husbands and wives," and that they "are opposed to the making of promises," and that both were to remain free, as before their union, and they did not make the necessary and essential promises to constitute them husband and wife. Walker, as a part of the ceremony, said: "I abdicate in advance all the so-called marital rights;" and Lillian Harman agreed with him in all things. After this ceremony, which took place on Sunday, September 1st, 1886, and up to their arrest in this case, which took place on Monday, the next day after the ceremony, Walker and Lillian Harman lived together as husband and wife, but without any intention of being such in legal contemplation. That is, they lived together, but had no intention of creating that relation or *status* known and defined by law and by the customs and usages of all civilized society as marriage. This living together under such circumstances did not in law constitute a valid marriage. If they had lived together for years, and until they had had children, and until one of them had died, it might then, in the interest of the innocent children, and notwithstanding the perverseness and waywardness of their parents, be assumed and held that the parents had changed their first unlawful intentions, and had converted what would have continued to be an unlawful union into a legal and valid marriage. Much more might be said with reference to this question, but I think this is sufficient. In my opinion the union between E. C. Walker and Lillian Harman was no marriage, and they deserve all the punishment which has been inflicted upon them.

WHEELER AND WILSON MANUFACTURING COMPANY V. BOYCE.

(36 Kans. 350.)

Corporation — false imprisonment — damage — agency.

A corporation may be held liable for a false imprisonment procured by the wrongful acts of its agents and servants in the course of their employment, although it neither authorized nor ratified such acts.*

FALSE imprisonment. The opinion states the case. The plaintiff had judgment below.

* See note, 34 Am. Rep. 495.

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Waters & Ensminger, for plaintiffs in error.

G. N. Elliott, for defendant in error.

JOHNSTON, J. This is a proceeding to reverse a judgment rendered in an action for false imprisonment, brought by Jacob F. Boyce against the Wheeler & Wilson Manufacturing Company, C. S. Baker and J. W. Hughes. Hughes was dismissed from the action, and the judgment went only against the plaintiffs in error. The facts upon which the case was disposed of are substantially these: The Wheeler & Wilson Manufacturing Company, a corporation organized for the manufacture and sale of sewing machines, was engaged in business at Topeka, Kansas, and C. S. Baker was its general agent at that place. The company had sold a sewing machine to Mary Hatfield, who subsequently married Jacob F. Boyce, the defendant in error. She paid a part of the purchase-money, and signed a contract in substance that the title to the machine should remain in the company until the balance of the purchase-money was paid. In November, 1881, the company directed its general agent to bring an action of replevin against Mary Boyce to recover the machine, claiming that there was a balance due thereon, a claim which she denied. An action of replevin was begun before a justice of the peace, and a writ was issued and placed in the hands of Constable Hughes, who reported that he had made search for the machine and was unable to obtain possession of it. C. S. Baker, the agent of the company, then directed Hughes to make and file an affidavit before the justice of the peace, alleging that Mary Boyce and her husband, Jacob F. Boyce, were in possession of the machine and had refused to deliver it to him, and thus obtain a warrant for their arrest. This was done, and the justice issued a warrant to the constable commanding him to arrest Boyce and his wife and commit them to the Shawnee county jail, there to remain until they should deliver the machine. Under this warrant Jacob F. Boyce was arrested and placed in jail without being taken before the justice and without any examination, hearing or trial. The constable informed the general agent of the company that he had arrested Boyce and placed him in the county jail, as requested, and Baker replied, "Now I guess he will give up the machine." The replevin action resulted in a judgment in favor of Mary Boyce. Jacob F. Boyce was held in the county jail for

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ten days, and was never taken before any court or officer for examination or trial, and was finally discharged at the instance of the plaintiffs in error, and became sick in consequence of his confinement. He at once instituted this action, and the jury awarded him damages in the sum of \$1,000, and the verdict was approved by the trial court. The plaintiffs in error complain chiefly of the rulings of the court in the matter of charging the jury. The jury were instructed that if the evidence justified it they could find exemplary damages or smart-money against the defendants. After the jury had been out some time and had practically agreed upon their verdict, the court recalled them and advised them that he was in error in giving the instruction that they might in their discretion assess exemplary damages, and withdrew it from the jury, telling them that in their deliberations they should consider the instruction withdrawn. Objection was made to the withdrawal of the instruction, and an application of plaintiffs in error for leave to address the jury after the modification had been made was denied, and this ruling is assigned as error. This decision affords the plaintiffs in error no ground for complaint. The action of the court was favorable rather than prejudicial to their interests. The instruction given was predicated upon sufficient facts, was warranted under the law, and the defendant in error alone had reason to complain of its withdrawal. It is a well established principle of jurisprudence that corporations may be held liable for torts involving a wrong intention, such as false imprisonment, and exemplary damages may be recovered as against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the corporations for which they acted. This principle is too well settled to require argument, and the authorities sustaining it are numerous and well-nigh unanimous. *Railroad Co. v. Slusser*, 19 Ohio St. 157; *A. & G. W. R. Co. v. Dunn*, 19 Ohio St. 162; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; s. c., 7 Am. Rep. 39; *Railroad Co. v. Quigley*, 21 How. 213; *Railroad Co. v. Arms*, 91 U. S. 489; *Railroad Co. v. Bailey*, 40 Miss. 395; *Railroad Co. v. Blocher*, 27 Md. 277; *Hopkins v. Railroad Co.*, 36 N. H. 9; s. c., 72 Am. Dec. 287; *Railroad v. Hammer*, 72 Ill. 353; *Reed v. Home Savings Bank*, 130 Mass. 443; s. c., 39 Am. Rep. 468; *Fenton v. Sewing Machine Co.*,

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9 Phila. 189; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; s. c., 58 Am. Dec. 439; *Beogher v. Life Ass'n of America*, 75 Mo. 319; s. c., 42 Am. Rep. 413; *Wheless v. Second National Bank*, 1 Baxt. 469; s. c., 25 Am. Rep. 783; *Jordan v. Railroad Co.*, 74 Ala. 85; *Williams v. Insurance Co.*, 57 Miss. 759; s. c., 34 Am. Rep. 494; *Vance v. Ry. Co.*, 32 N. J. L. 334; Cooley Torts, 119; 3 Suth. Dam. 270, and cases cited; 2 Wait. Act. and Def. 447, and cases cited. The same doctrine has been fully recognized on several occasions by this court. *L. L. & G. R. Co. v. Rics*, 10 Kans. 437; *M. K. & T. R. Co. v. Weaver*, 16 Kans. 456; *K. P. Ry. Co. v. Kessler*, 18 Kans. 523; *K. P. Ry. Co. v. Little*, 19 Kans. 269; *Western News Co. v. Wilmarth*, 33 Kans. 510. The withdrawal of the instruction, although erroneous, was beneficial to the plaintiffs in error; and there can be no reversal unless the erroneous ruling is injurious to the party complaining.

It is next contended that the company cannot be held liable for the wrongful acts of Baker and the constable, and an instruction is challenged which holds that if the agent of the company caused and procured the illegal arrest and detention of the defendant in error as charged, the company and its agents were both liable. Baker was the managing agent of the company, his authority was general, and the constable acted wholly under his direction and sanction. He had not only authority to sell machines and collect the money due for the same, but it is conceded that he had authority to institute legal proceedings to recover possession of the machines conditionally sold and for which payment had not been made in accordance with the terms of the sale. The arrest and detention of Boyce was incidental to the replevin action, and was made, as alleged, to compel the delivery of the machine under a provision of the Justices' Code relating to replevin, which provides that where the defendants or any other persons knowingly conceal the property replevied, or having the control thereof, refuse to deliver the same to the officer, they may be committed until they disclose where the property is, or deliver the same to the officer. Comp. Laws of 1879, chap. 81, § 69. He had full authority to represent the company, and whatever was done by him was done for the benefit of the company and for the accomplishment of its purpose. His act, although wrongful, was in the line of his employment, was done in the execution of the authority conferred upon him, and must be regarded as the act of the company. To make

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the corporation responsible it is not necessary, as plaintiffs in error contend, that the principal should have directly authorized the particular wrongful act of the agent, or should have subsequently ratified it. Judge, STORY, in treating of the liability of principals for the acts of their agents, says that "The principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in or indeed know of such misconduct, or even if he forbade of or disapproved of them."

And to sustain this he cites numerous authorities. "In all such cases," he says, "the rule applies, *respondet superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him through the instrumentality of agents." Story Agency, § 452.

[Omitting minor points.]

It follows that the assignments of error must be overruled, and the judgment of the District Court affirmed.

All the justices concurring.

Judgment affirmed.

SCHOOL DISTRICT V. NEIL.

(36 Kans. 617.)

Nuisance — obstruction of highway — common injury — school district.

A school district cannot maintain an action for the obstruction of a highway, impeding access to the school-house, unless it suffers an injury not common to the public.

INJUNCTION. The opinion states the case. The defendant had judgment below.

C. M. Anthony, for plaintiff in error.

Harkness & Godard, for defendant in error.

HOLT, C. The court below sustained a demurrer to the plaintiff's petition, because the same did not state facts sufficient to

constitute a cause of action. The plaintiff in error complains of such ruling. It is the only question in controversy. The petition states that plaintiff is a corporation; that in 1878 it was about to build a new school-house in the school district, and at a public meeting held for the purpose of obtaining the expression of the opinion of the legal voters as to the location it was finally agreed between plaintiff and defendant that a school-house should be located on the land of the defendant, upon the condition that he would allow to be opened and dedicated to the perpetual use of the public a common road or public highway in consideration of the sum of \$40 to be paid as damages for opening and locating the same; that plaintiff built a school-house worth \$800, and divers persons paid defendant the sum of \$40, and that the road was established as a public highway by the order of the board of county commissioners of Clay county. The petition further states, that on the 5th day of May, 1884, the defendant placed a fence across said road to prevent the public from using or travelling over the same, and that it was an irreparable damage to the plaintiff and the inhabitants of said district in going to and returning from said school-house; that said fence, so constructed, was and became a public nuisance, and is intended to shut out and prevent the public from having access over said road to said school-house. In the prayer to said petition it asks for the abatement of the nuisance, and an injunction inhibiting the defendant from molesting the public in the enjoyment of said road.

In ordinary actions the statement of facts constitutes the cause of action, and it is not generally required to embrace the details of damages, but in cases for losses sustained by public nuisances the rule is different. The gist of the action then is, that the plaintiff has sustained some damage peculiar to himself, differing in kind from that common to the public. The plaintiff failing to show such damage in the petition, it is so defective that a demurrer should be sustained thereto: If the loss of the plaintiff is simply greater damage of the same kind as that sustained by the rest of the community, such fact will not be sufficient to constitute a cause of action in favor of the party complaining. The loss to the public consists in the inconvenience in, or the obstruction to the use of the highway for travel, differing in degree but not in kind, according to the frequency of use which proximity of residence or peculiarity of occupation may impose. For this no individual can

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sue, but must resort to such public actions as are given by law. We presume it will be admitted that this plaintiff, as a corporation, has no greater right in maintaining a private action than an individual. Its claim for damages is, that the inhabitants of said district are prevented in going to and returning from said school-house over said road. It is not claimed in the petition that this is the only public road that could be used by the inhabitants of the district, by which access could be had to the school-house. In its petition it claims that the public are prevented from using this road, and that the inhabitants of the school district are injured because they cannot use it, being damages in kind sustained by all the plaintiff, the inhabitants of the district, and the public generally; and because there are no peculiar and special damages alleged to have been sustained by the plaintiff, differing in kind from the general public, we believe that the plaintiff's petition does not state a cause of action. *School District v. Shadduck*, 25 Kans. 467; *Heller v. A., T. & S. F. R. Co.*, 28 Kans. 627; *Barrelly v. City of Cincinnati*, 2 Disn. 516; *Wood Nuis.*, §§ 819, 820.

In *Holman v. Inhabitants of Townsend*, 54 Mass. 297, Chief Justice SHAW says: "That damage which a party sustains in consequence of not being able to use a highway is one which he sustains in common with all the rest of the community, * * * and can be properly redressed only by a public prosecution. Were it otherwise, every individual in the town or adjoining towns who owns a team or carriage, and would occasionally find it inconvenient to use the road, would have a separate action."

Lord COKE, speaking of this subject in Coke Lit. 56a, says: "For if the way be a common way, if any man be disturbed to go that way, or if a ditch be made over athwart the way so he cannot go, yet he shall not have an action upon his case; and this the law provided for avoiding of multiplicity of suits, for if any one man might have an action all men might have the like."

Damages sustained by the inhabitants of the school district ordinarily and naturally resulting from the obstruction of a public highway do not authorize the school district itself to enjoin defendant in this action. The school district is a part of the public community, and if it was damaged by a public nuisance which it sought to abate, then the public should take steps to abate it through the public officers. Our legislature has made ample provision in such matters. See section 1, chap. 153, Laws of 1885.

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We are of the opinion that the agreement between the school district and defendant, had at the time of the location of the school-house in said district, and the promise to allow the road in question to be opened, is not such a one that a breach thereof by defendant would authorize the issuing of an injunction against defendant.

It is recommended that the judgment of the court below be affirmed.

By the COURT.—It so ordered.

All the justices concurring.

Judgment affirmed.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY v. BURLINGAME TOWNSHIP.

(36 Kans. 628.)

Statute of limitations — demand — reasonable time.

Where a right of action accrues only upon certain preliminary proceedings and a demand, such proceedings and demand must be had and made within a reasonable time to prevent the statute of limitations from attaching.

ACTION for obstruction of a highway. The opinion states the case. The plaintiff had judgment below.

Geo. R. Peck, A. A. Hurd, and J. G. Egan, for plaintiff in error.

William Thomson, for defendant in error. .

JOHNSTON, J. This action was brought by Burlingame township, of Osage county, to recover \$7,290 damages alleged to have resulted from the building of the Atchison, Topeka & Santa Fe railroad across a public highway in Burlingame township in Osage county. The petition alleges that the highway was legally laid out and established long prior to the construction of the railroad, and that by the construction of the railroad, which was prior to January 1, 1884, the highway was materially injured by excavations and embankments, which rendered it dangerous for use by the travelling public; that on the 3d day of June, 1884, the defendant had failed and continued to fail for more than ninety days preceding that time to make good the crossing, and at the time of the commencement

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of the action had failed to do so; that on the 3d day of June, 1884, the township trustee of Burlingame township notified the board of county commissioners of Osage county of the facts, and made a statement to them showing the location of the crossing and the manner in which it had been injured by the construction of the road, which was verified by three resident tax payers of the township; that thereupon the county commissioners appointed three disinterested householders to view the crossing and assess the damages resulting from the construction of the railroad, designating June 17, 1884, as the time of meeting, and notified the railroad company of the time and place of meeting; that at the time and place designated the viewers met and from actual view assessed the damages resulting to the highway, by reason of the construction of the railroad, at \$7,290, and on the 18th day of June, 1884, they returned to the township trustee a certificate under oath of their action; that thereupon the township trustee immediately notified the railroad company of the amount of damages assessed by the viewers, and demanded payment of the same. The petition further alleges that on or before the 14th day of July, 1884, the railroad company had constructed its railroad across the highway, and had materially injured it by excavations and embankments; that the railroad company had for more than ninety days preceding the 14th day of October, 1884, failed to make good the said crossing, and then avers the giving of a new notice by the township trustee; and that new proceedings to assess the damages against the railroad company the same as those above described were had, and the viewers then appointed reported, on the 20th day of November, 1884, that the damages resulting to the highway by the construction of the railroad were the same as the first assessment, \$7,290; that notice of the assessment made was given to the railroad company, and payment demanded, but that more than thirty days elapsed, and the company had failed to pay that sum or any portion thereof. The action was thereupon brought by the trustee in the name of the township, and judgment demanded for the sum of \$7,290. The railroad company answered in three paragraphs, first, a general denial; second, that the railroad was built across the highway in 1869, and that the company then restored the highway to its former state, or to such a state as not to have necessarily impaired its usefulness, and did all the grading made necessary by the embankments and excavations at that crossing; third, that the railroad was constructed in 1869, and long

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prior to the 9th day of March, 1876, and "That said plaintiff's cause of action, if any, against said defendant, is a cause of action created by statute, and created by chapter 105 of the Laws of 1876, and accrued to said plaintiff at the expiration of ninety days from and after March 9, 1876, and said cause of action was at the time of the commencement of this suit, and the times mentioned in said plaintiff's petition, and each and all of them, barred by the statute of limitations."

The township filed a reply denying the allegations of the second count of the railroad company's answer, and demurred to the third count on the ground that it did not state facts sufficient to constitute a defense. This demurrer the court sustained, and to that ruling the railroad company excepted. The case came on for trial on August 25, 1885, and the jury found a verdict in favor of the township, assessing its damages at \$1,081.28, and also made special findings of fact on questions presented by each party. The railroad company moved for judgment in its favor on the special findings, which motion was overruled. It moved for a new trial, which was refused. Judgment was rendered for plaintiff. The defendant company has brought the case here.

We will dispose of the case upon the pleadings, the only question which we need to consider being whether there was error in sustaining the demurrer to the third ground of defense stated in the answer. This is a statutory action, brought upon a liability arising under the provisions of chapter 105 of the Laws of 1876, which went into operation March 9, 1876. In section 3 of that act it is provided that, "Whenever, by the construction of any railway within this State, the crossing of any public highway has been or shall be materially injured, either by excavations or embankments made by said railway company in the construction of said road, and the said railway company have failed to make good the said crossing, and continue to fail to do so, for the space of ninety days after the taking effect of this act, it shall be the duty of the township trustee of the proper township to notify the board of county commissioners of the fact, stating the location of the crossing, the manner in which the crossing has been injured, obstructed, or destroyed, verified by the affidavit of at least three resident tax payers of the said township."

It then provides that it shall be the duty of the county commissioners to appoint viewers, and designate a time and place when

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they shall meet and view the crossing, and assess the damages resulting to the highway from the construction of the railroad, and to give the railway company written notice of the time and place of such meeting. In section 4 it is provided that the viewers so appointed shall meet on the day designated, and from actual view assess the damages, and shall return to the township trustee a certificate under oath of the amount of damages by them assessed. Section 5 provides that it shall be the duty of the township trustee immediately upon the filing of said certificate to notify the railroad company of the assessment made against it, and demand payment of the same, and if the company fail to pay the amount for a period of thirty days, he is authorized to commence an action for the recovery of the amount of damages, and the certificate of the viewers is *prima facie* evidence of the amount of damages sustained.

This action was not begun for a period of nearly fifteen years after the building of the road, nor until about eight years after the passage of the act under which it is brought. On the one hand, it is contended that the cause of action accrued within ninety days after the taking effect of the act, and on the other, that it did not accrue until the proceedings were instituted by the township trustee, and demand for the damages assessed had been made by him. We think the latter theory cannot be sustained. If it could, the township trustee might delay indefinitely the institution of the proceedings and the making of the demand which are essential to the maintenance of the action. The statute makes it the duty of that officer to take the preliminary steps, and it both enjoins and implies prompt action on his part. On cases that had arisen before the passage of the act it was made his duty to institute proceedings at the end of ninety days from the taking effect of the act, and on cases that arise afterward it is fair to say that he is required to act within a reasonable time after the crossing is injured, obstructed, or destroyed. The nature of the case is such that he ought to act with promptitude. The interest of the people whom he represents forbids delay. If the crossing is destroyed and the highway rendered impassable, it is highly important to the public that the trustee should early take the steps which are necessary to restore and reopen the highway, which he alone can take. If it has been so injured or obstructed by the railroad company as to make it dangerous to the life or property of those who attempt to use it, a postponement of action on his part would be inexcusable. If it is

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a disputed question in regard to whether the railroad company had injured the crossing, or had failed to make it good after constructing its railroad over the highway, it is important to both parties that action should be taken before the evidence upon the question is effaced or lost. Certainly there is nothing in the duty cast on the trustee, or in the act imposing it, which contemplates a great delay in perfecting the cause of action. To permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitation, which are statutes of repose founded on sound policy, and which should be so construed as to advance the policy they were designed to promote. *Taylor v. Miles*, 5 Kans. 499; *Sibert v. Wilder*, 16 Kans. 176; s. c., 22 Am. Rep. 280.

The period prescribed by the legislature within which actions that are based on a statutory liability, as is the present one, are to be brought, is three years after the cause of action accrues, and not afterward. Civil Code, § 18. The preliminary steps essential to the bringing of the action are to be taken by the township, and these steps should be taken within a reasonable time after the injury occurs, or after action is required of the trustee. What is a reasonable time is not always easily defined, but as diligence is required of the trustee, he certainly should have taken the steps essential to the bringing of the suit within the statutory period fixed for the bringing of such actions. There is as much reason for an early commencement of the initiatory proceedings as there is for the institution of the action itself. *Jones v. Eisler*, 3 Kans. 134, was an action to recover upon a promise to pay a certain sum of money when the promisor received a payment from the government, or as soon as otherwise convenient; and it was held that it could not have been contemplated that if the promisor never got his money from the government, or was never in a condition that he could conveniently pay, the money was never payable, but that in any event it was payable in a reasonable time after the statutory limitation would run.

The Supreme Court of Pennsylvania, in considering the effect of the statute of limitations, held that where a demand or a notice was necessary to found an action upon, the right of action would be extinguished if there was unnecessary delay in making the demand. Justice THOMPSON, in giving the judgment, said: "To give effect to the spirit of the statute, the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause

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of action shall be taken to have accrued by the duty of diligence required of the party. Where the time for doing the act necessarily precedent to bringing the suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins, and if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run." *Morrison v. Mullin*, 34 Penn. St. 12.

In *P. & C. R. Co. v. Byers*, 32 Penn. St. 22; s. c., 72 Am. Dec. 770, it was held that where a call was necessary to precede a suit for a railroad subscription, it must, by analogy to the operation of the statute of limitations, be made within the time fixed as a bar against such suit. In *Codman v. Rogers*, 27 Mass. 112, it was ruled that if a demand was essential to the maintenance of an action, it must be made within a reasonable time, and that what is to be considered a reasonable time must depend upon the circumstances of the case, but if no cause for delay is shown, the demand should be made within the time limited for bringing the action, and is not in time afterward. In *Steele v. Steele*, 25 Penn. St. 154, the effect of the claimant's delay upon the starting of the statute of limitations was considered, and it was there said that "a party cannot stop the running of the statute of limitations by his own negligence, or by any arrangements for his own convenience." The same doctrine was strongly sustained in *Palmer v. Palmer*, 36 Mich. 487, in an action upon a promissory note payable thirty days after demand, where a demand had not been made until after the statutory period of limitation had elapsed. In that case, the court said :

"If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues, for the purpose of setting the statute in motion, as soon as the creditor, by his own act and in spite of the debtor, can make the demand payable."

The township, by its own act, could have perfected its cause of action regardless of the wish or action of the other party, and within the foregoing principles and the allegations for the answer, the action was barred. No excuse is given for the long delay, and it does not appear that it resulted from the action of the railroad

company. The precedent action might have been taken in 1876, but as we have seen, the plaintiff below has remained quiet for about fifteen years since the alleged injury occurred, and about eight years after the claim for the injury should have been perfected and sued upon by the township trustee. Eight years is a longer time than is allowed by law for the commencement of any action for the recovery of money, and much longer than the time within which an action for a statutory liability may be brought.

For the error pointed out, the judgment of the District Court must be reversed and the cause remanded for such action as may properly be taken.

Judgment reversed and cause remanded.

All the justices concurring.

HOWELL V. MCCRIE.

(36 Kana. 683.)

Homestead — invalid mortgage by wife — ratification.

A husband executed a mortgage of his homestead, and signed or procured some one to sign his wife's name to it without her authority, and procured a notary to certify the acknowledgment as made by his wife. Some weeks after, the wife executed an instrument attempting to ratify the mortgage. *Held*, invalid.

FORECLOSURE. The opinion states the facts.

Smith & Solomon, for plaintiffs in error.

T. M. Pierce, for defendant in error.

SIMPSON, C. The precise question in the case is, whether the written instrument executed and acknowledged by Nannie E. Stoner, on the 27th day of December, 1881, considered in connection with the mortgage executed by her husband, Samuel A. Stoner, on the 12th day of November, 1881, fulfills the requirements of article 15, section 9 of the Constitution, and amounts to and is the joint consent of husband and wife to the alienation. In this case the husband, without the knowledge or consent of the wife, executed a mortgage on the homestead, signed, or procured

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some one to sign, the name of the wife to the instrument creating the lien, and then fraudulently procured its acknowledgment by a notary public. Subsequently the notary, learning the facts and becoming uneasy for his own safety, sought the wife at a time when the husband was not present, and "explaining to her the nature of his business," she by a written instrument attempted to ratify what her husband had done. Is this consent? Is it the joint consent of husband and wife as contemplated by the Constitution?

The homestead feature of the laws has always been regarded with peculiar favor by the courts of those States by which it has been enacted. It has been the theme of both forensic and judicial eloquence. It has been repeatedly declared in legislative halls and from the bench, that the policy of these laws is "liberal" and "benevolent," "their object a noble one;" that "they are an enlightened public policy," and "their provisions the most beneficent." In the convention that framed the Constitution of this State there was no one subject that was more carefully considered and more thoroughly discussed than the homestead provision. At least twenty-five pages of the published debates of that body are devoted to the discussion of this subject. In the various stages and phases of that discussion, among the many opinions and comments made on the section, as it was being perfected, and as finally adopted, the following expressions are selected as guides to the intention of its authors, to-wit:

"The wife's right to the actual control of the homestead."

"The guarantee of a home to every member of the family."

"A reckless or drunken husband should not have power to alienate the home of his family."

"The protection of the family, and not the head of the family merely."

"To give permanency and value to the homestead by making its alienation difficult."

"To put it out of the power of the husband or the misfortunes of trade to take away the homestead."

"A home for the family, that Shylocks cannot reach."

"The woman, the wife and mother, shall have control of the home."

"There is no intention to exclude the woman, for that would destroy the object of a homestead."

"Neither the hand of the law nor all the uncertainties of life can eject the family from the possession of it."

"Gives every mother and child in the State a home to which they may retire and find shelter from the storms of life."

This is the spirit in which the homestead provision was conceived, and these are the reasons for its adoption, and it must be read in the light and construed in the spirit, of these declaratory statements of its framers. In the earliest adjudications of this court on questions arising under this homestead feature of our Constitution, the same or similar expressions are used. In *Morris v. Ward*, 5 Kans. 239, Mr. Justice VALENTINE says: "The homestead was not intended for the play and sport of capricious husbands merely, nor can it be made liable for his weaknesses or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and of society; to protect the family from destitution, and society from the danger of her citizens becoming paupers."

In *Helm v. Helm*, 11 Kans. 19, Chief Justice KINGMAN says: "The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against any act of her husband or of creditors without her consent. If her husband abandons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home."

"These citations are sufficient to show that both the convention that framed the Constitution and the court whose prerogative it is to construe it, have unitedly declared its purposes and objects to be for 'the protection and maintenance of the wife and children against the neglect and improvidence of the husband and father.'"

This court, in the consideration of questions arising under this provision of the Constitution and the statutory enactments in aid thereof and supplemental thereto, must give them a liberal construction, so that the purposes intended by the laws shall the better be advanced and secured. *Thomp. H. & Ex. 8*, and authorities there cited. These same considerations induce the courts to adopt a strict rule respecting their alienation, to the end that what is regarded so highly as to be embodied in the organic law as the most beneficent legislation and the most enlightened public policy, is not to be lightly regarded and easily avoided by the parties for whose protection the legislation was adopted. Hence it is held that the homestead right can be barred only by complying strictly with the

laws prescribing the mode of alienation. *Moore v. Titman*, 33 Ill. 360; *Kitchell v. Burgwin*, 21 Ill. 45; *Conner v. McMurray*, 84 Mass. 202; *Greenough v. Turner*, 77 Mass. 332; *Hoge v. Hollister*, 2 Tenn. Ch. 606; *Dickinson v. McLane*, 57 N. H. 31. To divest the homestead estate, the mode of conveyance prescribed by the law governing the alienation of such estates must be strictly pursued. This is the rule generally adopted in all the States, in which such laws have been enacted, held more strictly in some than in others, and yet in all there must be a literal compliance with the provisions of the statutes in this behalf.

From all the adjudications upon this subject, the three following rules are deduced, and may fairly be considered as settled:

1. The object of the homestead law is to protect the family of the owner in the possession and enjoyment of the property.
2. That construction must be given such laws, which will best advance and secure their object.
3. To divest the homestead estate, there must be a literal compliance with the mode of alienation prescribed by the statute.

Applying these rules to the mortgage first executed by Stoner, and subsequently to its attempted ratification by Mrs. Stoner, the conclusion is irresistible that it was not done in compliance with the provisions of the homestead law, and that it was violative both of the letter and the spirit of the Constitution. The requirements of the organic law in this respect are plain and unmistakable: "The homestead shall not be alienated without the joint consent of husband and wife, when that relation exists." The consent of the wife to the execution of this mortgage was not had before, or at the time of the attempted alienation on the 12th day of November. If she ever consented, it was long after its delivery, and at the time of the acknowledgment of the alleged ratification on the 27th of December.

Is this the act of "joint consent" as required? The usual and legal signification of the word consent implies assent to some proposition submitted. In cases of contract it means the "concurrence of wills." Consent supposes a physical power to act, a moral power of acting, and a serious, determined and free use of these powers. In the very nature of things, consent to the alienation must precede the act of conveyance. The husband must have made a proposition to the wife, or the wife to the husband, or a purchaser to both, to alienate the homestead, and the mind of the

husband and of the wife must have concurred, and they must have jointly consented to the execution of the conveyance, or the creation of the lien, both assenting and both signing the instrument before delivery. "It might be that a husband and wife, by two separate instruments, could alienate the homestead when it was intended by both that such instruments should operate together as a single instrument; for in such a case it might perhaps be said that the separate consent of each had such a connection with each other, that they might together be considered as the joint consent of both." VALENTINE, J., in *Ott v. Sprague*, 27 Kans. 620.

In such a case, where it clearly appears that there had been a previous consultation between husband and wife, and both, with full knowledge of all the facts and circumstances, had consented to the alienation, and where there is an entire absence of fraud, intimidation or concealment of material facts from the wife or the husband, and where from the temporary absence of either, or being widely separated, and there being a necessity for prompt action to take advantage of a bargain conducive to the interests of both, under such and similar circumstances, an alienation of the homestead by separate instruments, but each containing a reference to the other, might be upheld; but the safer and better rule to observe is to have the joint consent of the husband and wife evidenced by their signatures to the same instrument, at the same time and place, before the same officer, and in presence of each other. The word "joint" seems to have been used advisedly and with such a purpose, and to hold otherwise would be to ignore it in the construction of the constitutional provision, instead of giving to it the force and meaning it is naturally entitled to.

In *Luther v. Drake*, 21 Iowa, 92, on this question the court say: "The point made by counsel is, that as the husband and wife did not concur in and sign the same conveyance, the homestead title did not pass, and the deed was of no validity under the statute. The question is not free from difficulty. The interests involved therein to property of untold value in the State are too great to justify its determination until it necessarily arises; as at present advised, this court might not be united in its solution, and as the same can be disposed of upon other grounds, we prefer to leave it open for future consideration."

In *Dickinson v. McLane*, 57 N. H. 31, the case being this: "March 13, 1862, John Dickinson, the plaintiff's husband, mort-

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gaged the premises to Z. K. Dickinson, releasing all his right to a homestead therein, but the plaintiff did not sign the deed. This mortgage was foreclosed December 16, 1864, and the defendant holds the title. March 28, 1863, the plaintiff, by her separate deed (her husband not joining therein), quitclaimed to said Z. K. Dickinson, 'all the right of homestead that she might or could be entitled to, in any event, or in any change of life or circumstances,' in said premises." At this time John Dickinson and the plaintiff had three minor children. SMITH, J., said: "There is nothing in the act of 1851 in relation to homesteads, or in any subsequent statutes, that shows any intention of the legislature that a married woman might release her right of homestead by a separate deed. Indeed the language used implies that a release of homestead, to be valid, must be by the joint deed of the husband and wife. * * * Again the natural construction of the language of the 6th section, 'unless the wife join in the deed of conveyance,' is that she join in the same deed he executes, and not by her separate deed. But aside from this, there is nothing in the act which shows that the legislature, in providing that the wife might join in the deed of conveyance by her husband of the homestead, intended that any different construction should be given to such provision than what the law, as it had been in force in this State up to that time, would permit her to do. From these views, it follows that the plaintiff never released her homestead in the premises set out in her bill, by any valid deed." CUSHING, C. J.: "The portion of the statute, which according to my understanding is to govern this matter, is as follows: 'And no release or waiver of such exemption shall be valid unless made by deed executed by the husband and wife, with all the formalities required by law for the conveyance of real estate.' (Comp. Stats. 474, § 1.) In the very teeth of this statute we are asked to hold that the homestead here has been released by the separate deeds of the husband and wife, executed during the life of the husband. The policy of the law has wisely provided that this most important right, this *tabula e naufragio*, this last plank from the shipwreck, shall not be lost unless the husband and wife lose their hold of it at the same time and by the same act. In some way, it is not material to us to inquire how, the wife has been induced to execute this deed alone; probably because the husband then refused to join in it. And it is proposed that the first time a matter of this kind is brought to the

notice of the court, the law should be judicially repealed. Why? I am not able to see any reason for doing so, and I therefore think that the homestead of the plaintiff is not released." LADD, J.: "The separate deed of the husband and the separate deed of the wife are alike ineffectual to pass the homestead right. By the plain terms of the statute, neither can have any effect upon it. It seems to follow that the separate deeds of both must be equally ineffectual. The statute created a new and somewhat popular estate — an inchoate right in which the wife and minor children, as well as the husband, have an interest. It provides the exact mode in which that right may be released or conveyed. * * * It was doubtless thought necessary to guard thus carefully the mode of conveying away the right, in order to secure fully the beneficial purposes of the act. I do not think it is within the power of the court to hold that any mode of conveyance, different from that required by the act, is effectual, either by way of estoppel or otherwise. Our cases, where it has been held that a release by the wife of her right of dower, by a separate deed executed subsequently to the deed of her husband, cannot govern this case, because of the clear and unequivocal terms of the statute prescribing the only way in which the homestead right can be conveyed."

In the case of *Poole v. Gerrard*, 6 Cal. 71; s. c., 65 Am. Dec. 481, the case being this: Hiram Poole, the husband of the plaintiff, on the 15th of September, 1853, conveyed the homestead to the defendant for \$3,500, by a deed in which his wife did not join, though it was made with her knowledge. Poole the next day left the country. The plaintiff's wife, who was residing on the property under the impression that she had no legal rights to the homestead, conveyed her claim thereto to the defendant for \$200, by a deed executed and acknowledged as if she were a *feme sole*, on the 28th day of September, 1853. She subsequently brought this action to recover possession of the homestead, and for rents, etc. HEYDENFELT, J.: "The court below erred in deciding that the deed of the plaintiff (the wife) conveyed all her interest in the property. To make a valid sale of the homestead requires the joint deed of husband and wife. The husband must make the contract, and the wife must assent to it by an examination separate and apart from her husband. This is the mode pointed out by the statute, and it must be strictly pursued."

The case of *Sprague v. Ott*, decided by this court and heretofore cited, was one in which the husband and wife had made separate

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conveyances of their homestead, but there was an interval of eight years between the execution of the deed of the husband and that of the wife, during all of which time the wife had been separated from the husband, and for the most of that time both had been absent from the homestead. It was held by the court, Mr. Justice VALENTINE delivering the opinion, that—"Where two separate and distinct instruments are executed, at two separate and distinct times, as in this case; where a long interval elapses after one is executed, before the other is executed, the interval in this case being over eighty years; and where the two instruments are executed without any reference to each other, or without any intention that the two together may be considered as one single and united instrument, we think that one cannot make the other valid."

In *Morris v. Ward*, 5 Kans. 239, it is held that a mortgage of the homestead executed by the husband alone is void.

In *Dollman v. Harris*, 5 Kans. 597, it is held that a mortgage of a homestead, executed by the wife alone, is void, notwithstanding the legal title to the same may be in her and not in her husband. How then can it be said that two void instruments, one executed by the husband and the other by the wife, mortgaging the homestead, can have the effect to create a lien? They are void for all purposes, whether considered separately or taken together.

Counsel for defendant in error refers to the case of *Spafford v. Warren*, 47 Iowa, 47, and claims that case as decisive of this. We do not think so. In that case the wife having previously been consulted consented to the execution of the mortgage, and she and her husband, in presence of each other, signed and at the same time acknowledged the instrument. The name of the grantee and the description of the property were left blank, and the writing was left in the possession of the husband, to be used in accordance with the understanding between the husband and wife, to secure a creditor of the husband. The wife left home upon a visit, and during her absence the husband discovered that the blank instrument executed by her and himself was a deed absolute. He filed the proper blank with the description of the property which he and his wife intended to incumber by the mortgage. A short time thereafter, having bargained a sale of the homestead to defendant Warren, he filled the other blank in the instrument executed as aforesaid by the plaintiff with the name of the purchaser Warren. On the return of the wife her husband informed her of the uses to which the instrument

executed by them had been put, and of the sale and conveyance of the homestead by means of that instrument. With this knowledge she consulted lawyers, who advised her that her rights in the property had not been divested by the conveyance. With this knowledge and advice she and her husband occupied the house until the March following the conveyance; and while so occupying, it was offered for sale by the purchaser, and Warren took one person with whom he was negotiating with that view, to see it. They were met by the wife, who knew the object of the visit, and she made no claim to the property. Shortly after this the husband and wife removed from the property, and a tenant of Warren went into the possession thereof. More than three years after Warren purchased the property, and nearly three years after plaintiff removed from it, she commenced an action in chancery to set aside the conveyance. In the meantime Warren had paid off the mortgage resting upon the property at the time of its purchase from her and her husband, had discharged a debt of the husband's which he had assumed to pay as a part consideration for the purchase, had made certain improvements upon the house, and had executed a mortgage on the property to one Stevens. The court held on this state of facts, that "the law raises a presumption that she has assented to the validity of her deed, and thus cured its infirmities by ratification." This case may have been properly decided on the ground that the wife, with the full knowledge of her rights as advised by counsel, and of the action of her husband as communicated by him, voluntarily surrendered her property, made no objection to the defendant's title when he offered to sell it in her presence, permitted him quietly to hold possession of it for more than three years before she commenced her action, and knew that he was making improvements and discharging indebtedness resting on it. All these facts may have been sufficient to estop her from claiming an interest in it. She kept silent when she ought to have spoken. I do not understand that these acts of hers, or rather absence of protest, complaint, or action, ratify her conveyance; I can understand how by these things she can be estopped from setting up or claiming any interest in the property. The learned judge who delivered the opinion used estoppel and ratification interchangeably, and as if they are synonymous and of the same legal signification. I do not so regard them. Applying the most approved definition of estoppel (that of Bigelow) to the facts in the Iowa case, and the result would be that her acts were such in re-

spect to the property that it would be a fraud on the purchaser to permit her to impair or controvert them. The character of estoppel is given to what would otherwise be a mere matter of evidence. Estoppel may be created by silence or non-action, while ratification requires some positive, assertive act; and it does not make any difference whether the ratification is express or implied, for if implied, it is from the act of the individual respecting the subject-matter of the controversy.

The case at bar is one in which the contention of the counsel for the defendant in error is, that the wife ratified the execution of the mortgage in her name by the husband. The case of *Spafford v. Warren* is one in which the wife placed herself in such a position by her non-action as to be estopped. In this case there is not a single element of the doctrine of estoppel to be found. It may be that in view of the decision of the Supreme Court of Iowa in the case of *Stinson v. Richardson*, 44 Iowa, 373, it was necessary for the court in *Spafford v. Warren* to deal liberally with the doctrine of ratification. In the first case it says: "It is contended that the plaintiff [the wife] assented to and even advised the sale, and that she is now estopped from setting up her homestead rights in the property, if she ever had any. But if we should hold that she relinquished her homestead rights by verbally consenting to the assignment, or estopped herself by such consent, we should nullify an express provision of the statute. Whether she knew it was a nullity or not, there was nothing she could do or say about it, short of concurring in and signing the same joint instrument with her husband, that could give it any validity."

It would seem that this comes very close to saying that a married woman could not be estopped by any thing she could say or do, except joining in the conveyance, from claiming her interest in the homestead.

In this State, the question of estoppel is an open one in this class of cases. In the case of *Helm v. Helm*, *supra*, Chief Justice KINGMAN, in commenting on the facts of that case, says: "It may well be questioned whether an innocent purchaser would not hold the land against her who had stood silent while he purchased for a full consideration the land which the record showed belonged to William Helm."

No opinion is expressed now with reference to it, there being no facts in this case that invoke it; we will meet it when it comes.

There is another reason why this attempted ratification is not effectual to make it so: "It must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the act to be ratified, and if the principal assent to the act while ignorant of the facts attending it, he may disaffirm it when informed of such facts. Indeed, in the very nature of things this must be true. The effect of ratification is to create a contract; but a contract implies assent, and how can there be assent without knowledge?" *National Bank v. Drake*, 29 Kans. 311.

There is no finding or conclusion of fact that the wife was made acquainted with all the material facts attending the execution of the mortgage by her husband. The court below in the fourth conclusion of facts says that the notary who took the acknowledgment of the mortgage, being uneasy about his position in the premises, procured another notary to accompany him to Lancaster to see her about it, on the 27th of December. Samuel A. Stoner was not at home, and they found the wife at home alone. The other notary explained to her "the nature of their business," and told her that she had a right to do as she pleased, but that if her husband had forged her name, he was liable to get into trouble. She expressed her willingness to ratify what had been done, and she signed and executed the instrument. This does not make the showing of knowledge required by law. A notary who had deliberately violated a criminal statute of the State went to the wife, whose name had been forged to a mortgage by her husband and her acknowledgment certified to by this notary, and explained to her the nature of his business, told her it is true that she could do as she pleased, but coupled it with a statement that if her husband had forged her name he was liable to get into trouble. The nature of the notary's business was to save himself from trouble. He was not a party to the contract; he did not know all the circumstances attending it; he did not visit the wife in good faith to impart knowledge of all the material facts and circumstances of the transaction; he was there to shield himself from the consequences of a criminal act, and not as a party to the contract. To hold such a ratification effectual would put it in the power of every reckless and improvident husband in the State to render nugatory a plain constitutional provision. Such a husband could sign his wife's name to a mortgage of the homestead and have it certified as acknowledged, and probably in every instance the wife

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would ratify rather than see her husband suffer. "To constitute a ratification, it must be voluntary, deliberate and intelligent; and the party must know that without, he would not be bound."

The conclusions of fact respecting the execution of this ratifying instrument by Mrs. Stoner do not authorize the conclusion of law that the mortgage as ratified is valid. We will not stop to discuss the question as to whether the act of Stoner in signing the name of his wife to the mortgage, or procuring some other person to do so, is a void or a voidable act, and if void, not subject to ratification. While the writer of this opinion has a very decided conviction on the question, its solution is not absolutely necessary to the disposition of the case in this court. There is however another most important and serious reason why this attempted ratification is not effectual. A criminal act is not capable of ratification. It is a conclusion of fact in this case, that Nannie E. Stoner never signed the note and mortgage, and that her name was probably signed to them by her husband. Whoever did sign her name was probably guilty of a violation of the first subdivision of section 114 of the act regulating crimes and punishments (Comp. Laws of 1885, chap. 31, § 114), and rendered himself liable to be charged with the crime of forgery in the first degree. The notary, C. F. Goodrich, certified the acknowledgment of the execution of the mortgage by Mrs. Stoner, when in truth no such acknowledgment was made, and this was in violation of the first subdivision of section 119 of said act (Comp. Laws of 1885, chap. 31, § 119), and he rendered himself liable to be charged with the crime of forgery in the second degree. We will not temporize or refine with this question. It may be said that the wife should be permitted to ratify the mortgage so far as the innocent mortgagee is concerned, he having no knowledge of the fraud; but the answer to this is, that both the signatures to and the certificate of the execution and acknowledgment of the mortgage are criminal acts, and cannot be ratified for any purposes. It is always the case that some innocent persons suffer by reason of the commission of a criminal act, for no good results can flow from it, nor any rights be acquired by it or in consequence of it. We cannot conceive of any state of facts or any chain of circumstances, except it possibly be by estoppel, whereby any person can acquire any interest, estate or lien upon real estate by an instrument to which signatures are forged, and a false certificate of acknowledgment is attached.

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This question has been considered by the courts of other States; and probably the most thoroughly considered case is that of *Workman v. Wright*, 33 Ohio St. 405, the best report of which is found in 31 American Reports, 546, and foot-note, in which all the authorities *pro* and *con* are cited. We rest our views upon these two propositions: one is that there having been no pretended authority for the execution of the mortgage in the name of the wife by the husband, the doctrine of ratification does not apply; the other is that the written instrument executed by Mrs. Stoner on the 27th day of December was really a promise given for the purpose, and in consideration of avoiding a prosecution, and was therefore void as against public policy.

The mortgage of the defendant in error being void, any party to the suit can take advantage of it, and hence the plaintiffs in error, whose lien by the judgment of the court below was subordinated to that of the mortgage, can properly raise the question of its validity. "In an action to foreclose a senior mortgage executed by the husband, on answer by a junior mortgagee, alleging that the mortgaged property was the homestead of the mortgagor when the senior mortgage was executed, and that the wife did not join in its execution, constitutes a good defense to the action, even when the mortgagor makes no defense." *Alley v. Bay*, 9 Iowa, 509; *Dye v. Mann*, 10 Mich. 291.

It is recommended that this cause be remanded to the District Court, with instructions to so modify its judgment as to declare the mortgage of the defendant in error void, and that it is not a lien on the premises.

By the COURT. It is so ordered.

All the justices concurring.

Cause remanded.

 KANSAS CITY, FORT SCOTT AND GULF RAILROAD COMPANY v. KELLY.

(36 Kans. 655.)

Master and servant—railway brakeman—scope of employment—infant trespasser.

A boy fifteen years old wrongfully boarded a freight train to ride without paying fare, and a brakeman ordered him to jump off while the train was moving rapidly, and he fearing being thrown off, jumped and was injured. Held, that the company was liable. (*See note, p. 601.*)

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ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

Wallace Pratt and Chas. W. Blair, for plaintiff in error.

A. Smith Devenney, for defendant in error.

CLOGSTON, C. It appears from the evidence that on the night of the 16th of June, 1884, while the northbound freight train on the defendant's railroad stopped for water about one mile south of the city of Olathe, William Kelly got on the freight train between two freight cars, for the purpose of going to Kansas City; that he had no ticket, and no money to pay his fare; that he had been working in Galena, Cherokee county, Kansas, and had been sick, and was on his way home to Kansas City on the railroad without paying his fare. When the train started, and before it reached the station at Olathe, a brakeman passing over the train discovered the boy on the drawhead between the cars, and asked him where he was going, and whether he had any money to pay his fare; and the boy answered that he was going to Kansas City, and was without any money and could not pay his fare. The brakeman then directed him to get off the train. He said he would if they would slow up or stop the train. The brakeman then told him that the train was going slow enough for him to get off, and that he must jump off the train. The boy then climbed upon the ladder on the side of the car. The brakeman stepped from the car he was on to the end of the car where the boy was and told him to get off or he would throw him off. In obedience to this demand he jumped off the train, and in falling his right leg was caught under the wheels of the car and his foot and ankle were crushed. He was picked up by a man and carried to a hotel, where it was found necessary to amputate his leg between the knee and ankle. This was done.

The evidence does not disclose what the duties of a brakeman are on the defendant's road. In the absence of a rule defining his duties, we presume that under the general scope of his employment as servant of the company on the train, concerned in its management, and aware of the fact that a person who goes upon the train with the intent to ride thereon without paying fare is a trespasser, the implied authority in such case is an inference from the nature of the business and its actual daily exercise according to

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common observation and experience. Added to this, is the testimony of the brakeman, who answered, when asked how it happened, that he stood by and let Long, another brakeman, do all the talking with this young man; "I was to keep them off of my end of the train, and he was to keep them off of his." Assuming that the brakeman had authority to put trespassers off the train in a lawful manner, yet defendant insists that if the act was done, as the plaintiff claims, and the boy was forced off the train while it was running at a speed of eight miles per hour on a dark night, it cannot be said that the brakeman was acting in so doing under the scope of his employment so as to make the company liable. In this the defendant is mistaken. Assuming the case made by the plaintiff, the act complained of was reckless, wanton, and illegal, and if done within the scope of the brakeman's employment and authority, he was acting for the defendant, and not for himself. The removal of trespassers from the train was within the implied authority and became the duty of the servants in charge of the train; and the fact that in so exercising that right or duty they acted negligently and wantonly, and caused the boy to jump off the train while running at a speed unsafe for him to get off, and he was injured, will not exonerate the defendant. *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117; s. c., 6 Am. Rep. 200; *Higgins v. Turnpike Co.*, 46 N. Y. 23; s. c., 7 Am. Rep. 293; *N. W. R. Co. v. Hack*, 66 Ill. 233; *Kline v. C. P. R. Co.*, 37 Cal. 400.

The defendant had the right to put the boy off from its cars, and in doing so could use such force as was necessary to eject him, but in so doing must exercise the right with ordinary care and prudence on its part. And if the train was moving at such a rate of speed as to render it unsafe, and the night was dark, it must stop or slow up the train; and the mere fact that the boy was on the train as a trespasser was not such negligence as to relieve the defendant from this obligation, and gave its servants no license to negligently and wantonly eject him in a manner liable to do him great bodily harm. *Morgan v. Comm'rs of Miami Co.*, 27 Kans. 89. And it could make no difference whether he was ejected by actual force or by threats, if he jumped from the train in obedience to a command of the brakeman. He being a boy fifteen years old, he would not be expected to use that degree of judgment and discretion which would be expected and required of an adult. He believed, and he had a right to believe, that force would be used to eject him; and when

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he saw the brakeman coming toward him, threatening to throw him off, he cannot under the circumstances be charged with negligence for not having waited longer. *Kline v. C. P. R. Co.*, 37 Cal. 404; *Moulton v. Aldrich*, 28 Kans. 312.

Again, he was assured that it was safe to get off the train, and that it was not necessary to slow up. Relying upon either, the defendant cannot be heard to say that his injury was caused by his own negligence. What he was guilty of was in getting on the train without being prepared to comply with the regulations of the company in relation to carrying of passengers, and trying to ride on the train without paying fare; but at the time of the injury defendant well knew of this negligence, and was informed of the facts which showed him to be a trespasser on the train without right, save such right as the defendant owed even to trespassers. And we believe the true rule and doctrine to be that a railroad company is bound to exercise its dangerous business with due care to avoid injury to others, even to the protection of a trespasser who is not guilty of contributory negligence. *Beems v. C., R. I. & P. R. Co.*, 58 Iowa. 155; *Keffe v. M. & St. P. Ry. Co.*, 21 Minn. 207; s. c., 18 Am. Rep. 393; *K. C. Ry. Co. v. Fitzsimmons*, 22 Kans. 686.

The defendant complains of the instructions given by the court to the jury. Some of these objections we deem of not sufficient importance to receive comment; others are covered by the general discussion of the questions in this opinion. The defendant particularly complains of a part of the sixth instruction, which is as follows: "And I charge you that the plaintiff's right to recover is not affected by his having contributed to the injury, unless he was at fault in so doing."

The general rule is, that one cannot recover for an injury if he is guilty of negligence directly contributing to the injury; yet under the facts in this case, if the plaintiff was guilty of negligence, it was in boarding the defendant's train without first procuring a ticket, or having money to pay his fare; in other words, in attempting to cheat the company and be transported for nothing. Technically speaking, the jumping off the train by the plaintiff was negligence; and this instruction, in speaking of the plaintiff's negligence, was considering this kind of negligence; in fact, the only claim of negligence relates to these two acts of the plaintiff. We admit that these acts, taken and considered by themselves alone,

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and unexplained by circumstances and motives, establish negligence where those acts result in the injury. In the first instance the negligent act of the plaintiff was discovered by the defendant before the injury; and after this discovery, by the slightest care on the part of the defendant, the injury could have been prevented. Then can it be said or claimed that by reason of this negligent act the plaintiff was injured? As to the latter, it was caused by the acts of defendant's servants while in the discharge of their master's business. If the plaintiff, when discovered, had voluntarily jumped from the train while the train was in dangerous motion, or had done so without sufficient provocation or ground for alarm, or in anticipation of danger where none existed, or had failed to exercise reasonable care and caution, situated as he then was, and the like, these things would not justify or excuse him. So the mere negligent act alone, when shown, will not always determine the right of recovery. The act may exist, and yet be the result of no fault of him who commits it. We see no error in this instruction. *Nelson v. A. & P. R. Co.*, 68 Mo. 593; *City of Wyandotte v. White*, 13 Kans. 192.

Again, the defendant presents a single sentence from the ninth instruction, and claims it to be error: "Plaintiff was only required to exercise ordinary care to avoid injury." The ninth instruction, taken altogether, we think was properly given. It is as follows: "9. Plaintiff was only required to exercise ordinary care to avoid injury, but this requisite could only be complied with by the exercise of that degree of caution which persons of his age and intelligence and of ordinary prudence would use under the same conditions of danger, and with like knowledge of the situation."

This instruction, viewed in the light of the facts, properly states the law applicable to the facts. The plaintiff was on a train, and a trespasser. He was entitled to no protection from an injury resulting from his own acts or conduct, and could claim no protection from injuries received while so trespassing on the defendant's train, resulting from the ordinary and usual operation and management of the defendant's train; but to meet and protect himself against the wrongful acts of the defendant, he was not required to exercise more than ordinary care, considering his age, his situation and condition, and surrounding dangers. When he became a trespasser upon the train, he had no right to believe that by reason of that fact he was to be negligently or wantonly expelled, or ejected in a

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manner that would result in serious injury to himself. *Townley v. C., M. & St. P. R. Co.*, 53 Wis. 626.

In conclusion, defendant insists that the special findings of the jury show passion toward the defendant. We have carefully examined the special findings, and find no evidence of this charge, but on the contrary, find all of the special findings supported by some evidence. True, upon some questions the evidence is conflicting; but the jury's belief of one set of witnesses and disbelief of others is not of itself evidence of passion or prejudice. *K. P. Ry. Co. v. Kunkle*, 17 Kans. 145; *Whitaker v. Mitchell*, 58 Cal. 362.

We find no error in the record and therefore recommend that the judgment of the court below be affirmed.

By the COURT.—It is so ordered.

All the justices concurring.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Northwestern R. Co. v. Hack*, 66 Ill. 288, a boy of nine or ten years got on the steps of a railroad car in motion, holding on the railing, when a servant of the company, employed to clean and secure the cars and keep intruders out of them, kicked the boy's hand, thus loosening his hold, and he fell under the cars and was killed. The court said:

"It is urged that even if Delph did kick the hand of deceased, it was outside of his duty, and that appellant should not be held liable for the act. It is true, that the act of itself was not in the line of duty of any employee of the company, but the question is, whether the act was done whilst in the discharge of his duty; not in the precise manner in which it was done, but was it his duty to require persons to leave the cars and to prevent their remaining thereon? Myer, who had charge of that department, swears that he employed Delph and other car cleaners, and that it was their duty on Sundays, after cars arrived, to close them and see that no one was in them, also to clean, sweep out, and turn the seats of those that might be going out the same night. He testifies that the regulations are, that after the arrival of the trains, and the passengers get out, for the car cleaners to take charge of the cars, lock up, clean out, and keep people out of the cars. And Leary and Ross testified that they had charge of the train to put the cars in their place, but had nothing to do with those in the cars for the purpose of closing and cleaning them out. From this evidence it is manifest that the switchmen were only in charge of the train to place the cars where they belonged in the yard, and Delph was in charge of the cars for the purpose of discharging his duty therein under his employment. The regulations required him to keep persons out of the cars, and he, in the discharge of that duty seems to have driven other boys from the steps of the platform by kicking at them, and the act of kicking the deceased was no doubt to prevent him from getting in or upon the car, and was in the course of his duty. And in performing his duty, he exceeded all reason and acted with a recklessness that was monstrous; and on his examination, he seemed to have no conception of the enormity of such an act; he

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even seemed to be ignorant that such an act intentionally performed would have rendered him liable. He simply says that it might be that he could have been punished if he had kicked the boy off, and then, in further answer to the question, says that he could not get a chance at the boys, as they were too quick. With such a man in charge of the cars, the lives of children could not be otherwise than in peril.

"With a child of the age of deceased, who would follow his childish instincts without comprehending the danger he was incurring in getting on the train, and only realized his peril when the train had attained such speed that he, as he said, could not loosen his hold, it was monstrous to have the person intrusted with the custody of the car, kick his hand and break his hold, when to the most obtuse intellect, almost certain death must have resulted. Such conduct shows recklessness of life that is wholly indefensible."

In *Kline v. Cent. Pac. R. Co.*, 37 Cal. 400, a boy of sixteen jumped on the platform of a car moving at the rate of ten miles an hour, through the streets of a city to "catch a ride," and the conductor pushed him off, or he jumped off in obedience to a sharp command by the conductor, and was injured. The court held the company liable in either event. The court cited *Lovett v. Salem, etc., R. Co.*, 9 Allen, 561, and said: "If this be sound doctrine, and we see no reason to doubt, can there be any period in childhood of which it can be said by the court, *judicially*, or as a matter of law, that the judgment is so far matured as to enable a child to so far withstand the positive and menacing command of one in authority, as to cast, in whole or in part, the responsibility of obedience upon the child, if his obedience results in personal injury to himself? There may be moral as well as physical compulsion, and the former may prove as effectual as the latter; how then is one who resorts to the former less culpable than one who employs the latter? Or how can one who finds himself unable to resist the former, be held more responsible for the consequences than when he yields from necessity to the latter? Can his obedience in the former case be considered the result of his own will any more than his ejection in the latter? If as the testimony tends to show the conductor sharply ordered the plaintiff to get off the cars, at the same time putting his hand upon his shoulder as if to enforce obedience, and the boy then jumped, without waiting for further actual force, or resisting until thrust off by the superior strength of the conductor, can he say *judicially*, that his act was in any degree voluntary? The tone, manner and whole bearing of the conductor may have satisfied the boy that force would be used. If so, was not such a demonstration on the part of the conductor equivalent to actual and superior force? We have no doubt that in such a case a show or demonstration of force, sufficient to impress a reasonable person with the belief that it will be employed, must be held to be the equivalent of actual force. The danger of sustaining personal injury is much greater where a person is ejected by the use of actual force, than where he is ejected under circumstances which permit the exercise of some care on his part. It would be a rigid rule which would require a person to subject himself to such extra hazard, after it has become morally certain that actual force will be used, in order to free himself from all responsibility in respect to consequences, and fasten it upon his adversary. Although the plain-

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tiff was wrongfully upon the cars, the conductor was bound to exercise reasonable care and prudence in removing him; it had no right to eject him under circumstances that would endanger his personal safety. If the train was going at a speed which would render it unsafe for him to leave the car, it was the duty of the defendant, if determined to put him off, to stop or slow up sufficiently to allow him to descend in safety, by the exercise of reasonable care and prudence on his part. Although his entry upon the car was a trespass, yet if it was an accomplished fact before the conductor attempted to interfere, his entry did not directly conduce to the injury which he sustained, but was in the sense of the rule under consideration only its remote cause, and did not therefore absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train. In our judgment the act was within the conductor's general authority. In a conductor's excluding a person who is not entitled to be admitted or to remain in the cars, the relation of master and servant is as clear and apparent as it is in his receiving and providing for those who are entitled to admission."

In *Lovett v. Salem, etc., R. Co.*, 9 Allen, 561, the court said: "If the plaintiff had been a person of mature age, the mere words of the driver could not have been regarded as equivalent to a forcible ejection of the plaintiff from the car at a time when it was dangerous to leave it. For such a person might have exercised his own judgment as to the peril he might incur in attempting to obey the order. But the plaintiff was a child about ten years of age. His obedience would be naturally expected, without regard to the risk he might incur; and in respect to a child so young, the command would be equivalent to compulsion."

In *Biddle v. Hestonville, etc., Ry. Co.*, 112 Penn. St. 551, a street railway company was held liable for injury to a child compelled by the driver to jump from the platform of a car while in motion, although a trespasser. The court said (p. 552):

"That the defendant's driver, or conductor was grossly negligent in compelling a child of twelve years of age to jump, and that backwards, from the platform of a moving car, no one can well deny. Even the boy Solnack knew better than that, and did what he could to prevent the accident. To discuss, therefore evidence which throughout shows a reckless carelessness of which no man of ordinary discretion ought to have been guilty, would be to no purpose; hence we may regard the case as fully disposed of when we have made a brief statement of the law which ought to have governed the court below. It was a mistake to hold that because the child was a trespasser it could therefore be ejected in a manner which endangered its life or limbs. In the case of the *Pennsylvania Company v. Toomey*, we held, per Mr. Justice MERCUR, that such a disposition of a trespassing adult could not be allowed; and that ordinary care must be used to avoid injury even to a trespasser is fully established by the cases of the *Pennsylvania R. Co. v. Lewis*, 29 P. F. S. 83; *Hydraulic Works Co. v. Orr*, 2 Norris, 332; s. c., 40 Am. Rep. 667; and *Philadelphia and Reading R. Co. v. Hummell*, 8 Wr. 375. Moreover we have two cases which in point, rule the contention in hand; they are the *Pittsburgh, Allegheny and Manchester Passenger Ry. Co. v. Caldwell*, 24 P. F. S. 421, and

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Same v. Donahue, 20 P. F. S. 119. In the first case a child had been permitted by the driver to ride upon the front platform, from which, without his knowledge, it attempted to leave the car whilst in motion, and was injured; in the second the child was pushed or knocked from the platform by the driver, and in each case the company was held liable for the resulting injuries. Both children here mentioned were trespassers; for although in the first case the child was on the car by invitation of the driver, yet as he had no authority to give such invitation, according to the case of *Duff v. Allegheny R. Co.*, 10 Norris, 458; s. c., 36 Am. Rep. 675, it was but a trespasser. It is very true as was held in the *Hestonville Passenger Ry. Co. v. Connell*, 7 Norris, 523; s. c., 32 Am. Rep. 472, and the *Philadelphia and Reading R. Co. v. Hummell*, extra precautions are not required in anticipation of the intrusions of trespassers, even though they be children, but when they do so intrude and are known to be in an improper place, they must not be so wholly neglected as to endanger their lives or limbs. Any other doctrine would so illy accord with Christian civilization as to render its maintenance impossible."

See *Rounds v. Del., etc., R. Co.*, 64 N. Y. 129; s. c., 21 Am. Rep. 597; *Lott v. N. O., etc., R. Co.*, 37 La. Ann. 337; s. c., 55 Am. Rep. 500.

KINGMAN V. HOLMQUIST.

(36 Kans. 735.)

Sale — separation — when not essential to transfer title.

Where a certain number of articles are sold from an ascertained lot, identical in kind and value, a separation is not essential to transfer title.*

ACTION for conversion. The opinion states the case. The plaintiff had judgment below.

Garver & Bond, for plaintiff in error.

John Foster, for defendant in error.

JOHNSTON, J. The only contention of the plaintiff in error is, that the twenty-five thousand plants purchased by Holmquist were not separated from the whole number delivered, in such a way as to transfer the title to him, and enable him to maintain an action for conversion. The hedge plants were tied up in bundles of two hundred and fifty plants each, which so far as the record shows,

* See *Newhall v. Langdon* (39 Ohio St. 87), 48 Am. Rep. 426; *Com. Nat. Bk. v. Gillette* (90 Ind. 268), 46 Am. Rep. 222.

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were the same in quality and value. Holmquist purchased and paid for the plants, and the vendor agreed to deliver them at Kingman's place of business at Salina.* He did deliver them there in accordance with his agreement, and at the same time and place he delivered fifty-seven thousand for Kingman in part payment of an indebtedness which he owed to Kingman. The whole eighty-two thousand were delivered together to Kingman, and at that time he was informed that one hundred bundles, or twenty-five thousand, were for Holmquist, and that the remaining two hundred and twenty-eight bundles, containing fifty-seven thousand, were for himself. Kingman appropriated all of the plants to his own use, and hence this action.

We think the sale to Holmquist was complete, although the twenty-five thousand plants sold were not separated from the whole number delivered, and that the action for conversion can be maintained. It will be observed that the controversy is not with the vendor. He had received full payment, had tied the plants up in bundles and delivered them at the place agreed upon. By this action he intended to transfer the title to Holmquist, and he has ever since regarded and treated it as a complete sale. Nothing remained to be done by him to ascertain the quantity, quality, or price of plants sold. It is argued that because the bundles intended for Holmquist were not set apart or designated by some mark, the title did not pass. But separation could not make more certain the quantity, quality or price of the plants purchased by Holmquist. They were a part of a specific and ascertained quantity. There were three hundred and twenty-eight bundles of plants, which were uniform in the number contained in each, as well as in the quality and value. It was therefore immaterial from what part of the whole the one hundred bundles of Holmquist were taken. No possible advantage could have been gained by either party if the privilege of selection had been conferred upon him, and it is idle to dispute about the identity of articles that are equal in kind and value. Each had a right to a certain number of the whole, and either had a right to take possession of the number that belonged to him; and indeed the circumstances under which Kingman received the plants are such that he might properly be regarded as the bailee of Holmquist. He held for Holmquist a specified number of bundles which were a portion of a quantity that was ascertained and certain, and with which the seller had nothing further to do. While the English

and some of the American courts hold that in all cases the goods sold must be separated and specifically identified before the title will pass, the weight of authority in this country is that where the property sold is a part of an ascertained mass of uniform quality and value, separation is not essential, and the title to the part sold will pass to the vendee, if such appears to be the intention of the parties. This principle has been recognized by this court in a recent decision, and the authorities sustaining that view were there approved. *Piazzek v. White*, 23 Kans. 621; s. c., 33 Am. Rep. 211.

The Supreme Court of Connecticut, in an action involving the title to three hundred and eighty bags of meal which had been purchased from a larger number of similar bags, considered this question, and while holding that where the articles sold from a larger number differed in quality, quantity, or value, a separation was essential to transfer the title, stated that: "Where the subject-matter of a sale is part of an ascertained mass of uniform quality and value, no selection is required; and in this class of cases it is affirmed by authorities of the highest character that severance is not as a matter of law, necessary in order to vest the legal title in the vendee to the part sold. The title may and will pass if such is the clear intention of the contracting parties, and if there is no other reason than want of separation to prevent the transfer of the title." *Chupman v. Shepherd*, 39 Conn. 413. See also *Kimberly v. Patchin*, 19 N. Y. 330; s. c., 75 Am. Dec. 334; *Pleasants v. Pendleton*, 6 Rand. 473; s. c., 18 Am. Dec. 726; *Hurff v. Hires*, 40 N. J. L. 581; s. c., 29 Am. Rep. 282; *Carpenter v. Graham*, 42 Mich. 191; *Waldron v. Chase*, 37 Me. 414; s. c., 59 Am. Dec. 56; *Horr v. Barker*, 8 Cal. 603; s. c., 11 Cal. 393; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Young v. Miles*, 20 Wis. 646; *Clark v. Griffith*, 24 N. Y. 595; *Lobdell v. Stowell*, 51 N. Y. 70; *Groat v. Gile*, 51 N. Y. 431; *Gardner v. Dutch*, 9 Mass. 426.

A further citation of cases, or an extended examination of the conflicting decisions upon this question, is unnecessary here. A very elaborate and careful review of the authorities is made by Mr. Benjamin in his treatise on Sales, in which he reaches the conclusion that when the property sold is part of a mass made up of units of unequal quality, such as cattle out of a herd, their selection being material, the decisions all hold that the title will not pass until a selection has been made; but that the weight of recent American authority sustains the proposition that when property is

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sold to be taken out of a specific mass of uniform quality, the title will pass at once upon the making of the contract, if that appears to be the intention of the parties. 1 Benj. Sales, §§ 469-487. The present case falls within this authority, which we deem to be controlling, and hence there must be an affirmance of the judgment of the District Court.

All the justices concurring.

Judgment affirmed.

KANSAS PROTECTIVE UNION v. WHITT.

(36 Kans. 700.)

Insurance — life — when proofs of death not necessary.

Where a life insurance company has refused to pay a policy on the grounds of non-membership and forfeiture for non-payment of premiums, no formal preliminary proof of death is necessary.*

ACTION on a life insurance policy. The opinion states the case. The plaintiff had judgment below.

Foster & Hayward, and T. R. Patton, for plaintiff in error.

O. C. Cowgill and E. A. Austin, for defendants in error.

CLOESTON, C. The policy, the foundation of this controversy, contains the following undertaking on the part of the company :

"The said union does hereby promise and agree to pay * * * the sum of two thousand dollars, to Ellen Whitt (wife), or her executors, administrators, or assignees, within sixty days from the close of the quarter in which satisfactory proofs of the death, during the continuance of this certificate, of the above-named member are received. It is provided however that the sum thus to be paid is conditioned upon assessments made therefor, and shall in no case exceed seventy-five per centum of the amount received thereon."

The policy also contains some twelve conditions, but two of which are brought into question in this action. They are as follows :

*To same effect, *Grattan v. Metropolitan Life Ins. Co.* (80 N. Y. 281), 36 Am. Rep. 617.

"That the annual dues and assessments, and any note given for any indebtedness to the union, shall be paid on or before the day on which they became due."

"That if the certificate becomes a claim before the sum of ten dollars for each one thousand dollars of indemnity named shall have been received from payments made thereon for benefit of the reserve fund of this union, the right is reserved by this union to deduct such deficiency from the amount due the beneficiary under this certificate."

The plaintiff in error contends that it is not liable on this policy: first, because no proof of death was furnished by the defendants in error as required by the conditions of the policy; second, that the certificate of membership was cancelled for non-payment of a note given for membership fee at its maturity; third, the court erred in refusing to allow the plaintiff to prove by its secretary that one Doyle was not its general agent; fourth, defendants in error failed to show that assessments had been made, and whether collected or paid in; fifth, the judgment was too large by twenty dollars. These five assignments are all the errors claimed and discussed in the plaintiff's brief, and we shall take them up in the order presented.

I. The evidence established the following facts: At the time Andrew Whitt became a member of the Kansas Protective Union, the fee of membership was eight dollars. In payment of that sum he gave his note, due August 30, 1884, and after the note became due he wrote to the company for an extension, which was granted until November 1, 1884. On October 26 he died, and on October 30 his son, one of the defendants in error, wrote to the secretary, inclosing eight dollars, and signed his father's name to the letter. Immediately after the death of Andrew Whitt, the beneficiary in the policy informed one Doyle, who was the general agent of the defendant, living in Sterling, Rice county, of such death, and requested him to inform his company, which he did by letter on November 4, and in reply whereunto he was informed by the company that Whitt was not a member of its company, his certificate of membership having been cancelled for non-payment of note given in payment for membership fee, and that it was not liable and would pay nothing. It was the rule and custom of the company upon being notified of the death of one of its members to at once forward the proper blanks on which to make proof of death, as required by its rules. No such blanks were furnished to the beneficiaries, and no proof of death was made.

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Under this evidence, we think no proof was required of the beneficiaries of the death of Whitt. The union had disclaimed its liability, and insisted that the certificate of membership had been cancelled, and for that reason it sent no blanks for proof of death. Had it simply refused to pay because no proof of death had been made, then that objection would be good; but as the union disclaimed on other grounds, it must rely upon the objection then made. The court instructed the jury that the denying of the liability on the part of the union to pay the loss was a waiver by the company of its right to demand the proper proof of death. We think the authorities fully sustain this rule laid down in the charge upon this point. In *Transportation Co. v. Insurance Co.*, 34 Conn. 561, the court held that presentation of proof under such circumstances was of no importance to either party, as the law rarely if ever requires the observance of an idle formality, especially after the parties for whose benefit the original stipulation was made had rendered conformity thereto unnecessary and practically superfluous. See also *McBride v. Insurance Co.*, 30 Wis. 562; *Insurance Co. v. O'Connor*, 29 Wis. 241; *Insurance Co. v. Kranich*, 36 Mich. 269; *Donahue v. Insurance Co.*, 56 Vt. 382.

[Omitting the other points.]

It is recommended that the judgment of the court below be affirmed.

By the COURT.—It is so ordered.

All the justices concurring.

Judgment affirmed.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY V. JOHNS.

(36 Kans. 769.)

Evidence — declarations — of present suffering.

Declarations of a party in regard to existing pain and suffering may be proved by the testimony of any person to whom they were made.*

ACTION for personal injuries by negligence. The opinion states the point. The plaintiff had judgment below.

* See to same effect, *Cleveland v. Newell* (104 Ind. 264), 54 Am. Rep. 812; *Centra v. Roche v. Brooklyn City, etc., R. Co.*, ante, 506.

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Geo. R. Peck, A. A. Hurd, C. N. Sterry and Robert Dunlap, for plaintiff in error.

T. L. Davis and T. J. Hudson, for defendant in error.

VALENTINE, J. [Omitting other points.] The plaintiff in error, defendant below, also claims that the court below committed material error in permitting the following evidence to be introduced, to-wit: Mrs. M. D. Thatcher was permitted to testify, over the objections of the defendant, among other things, as follows:

"Well, I only know what Mrs. Johns has told me of her suffering, and I have been called in there as a neighbor. She complained of the misery in her side, and she told me that she suffered a great deal with a numbness and a tingling sensation in her left side, I believe it was; and the other evening I was called over there, and she told me that she was suffering now a great deal with that feeling, and also a depression about her heart, she said, in her left side, and she had sent for the physician, I believe, that evening; and that was some of the symptoms, I believe, that she had; of some kind of depression about her heart, a smothering, I think. * * * Mrs. Johns has complained of her limb and her foot to me."

Joseph H. Pitzer was permitted to testify, over the objection of the defendant, among other things, as follows:

"Q. Now, Mr. Pitzer state to the jury what facts you may know with reference to her condition, with reference to her suffering and bodily pain and mental distress. A. I don't know any thing only what she has told me herself.

"Q. What have you heard her say about it? Of what has she complained? A. She told me frequently that she has suffered. She complained of her head and leg, having a great misery in it. She complained of misery in her side and hip."

On cross-examination he testified, among other things, as follows:

"Q. All you know about her suffering and pains since the injury is what she has told you, is it not, Mr. Pitzer? A. That is all sir."

We think it is well settled that it is incompetent to prove the declarations of an injured party, or of a party suffering from some cause, made after the injury has happened or after the cause of his suffering has occurred, with regard to the facts of the injury or the cause of his suffering. *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Morrissey v. Ingham*, 111 Mass. 63; *I. C. R. Co. v. Sutton*, 42 Ill.

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438; *Collins v. Waters*, 54 Ill. 485; *Denton v. State*, 1 Swan, 279; *Spatz v. Lyons*, 55 Barb. 476. And even proof of the declarations of a party, with regard to past suffering or pain, or past conditions of body or mind, is not competent. *G. R. & I. R. Co. v. Huntley*, 38 Mich. 537; *Lush v. McDaniel*, 13 Ired. 485; *Reed v. N. Y. C. R. Co.*, 45 N. Y. 574; *Rogers v. Crain*, 30 Tex. 284; *Chapin v. Inhabitants of Marlborough*, 75 Mass. 244; *Rowell v. City of Lowell*, 77 Mass. 420; *Emerson v. Lowell Gas-light Co.*, 88 Mass. 146; *Inhab. of Ashland v. Inhab. of Marlborough*, 99 Mass. 48; *Ins. Co. v. Mosley*, 75 U. S. 397, 405.

There are probably no authorities opposed to these propositions, and yet there are authorities which seem almost to oppose the last one, especially where the declarations are made to a physician or surgeon while he is examining the party as a patient. *Quaife v. C. & N. W. Ry. Co.*, 48 Wis. 513; s. c., 33 Am. Rep. 821; *Barber v. Merriam*, 93 Mass. 322; *Fay v. Harlan*, 128 Mass. 244; s. c., 35 Am. Rep. 372; *Gray v. McLaughlin*, 26 Iowa, 279; *Matteson v. N. Y. C. R. Co.*, 35 N. Y. 487; *L. N. A. & C. Ry. Co. v. Falvey*, 104 Ind. 409; s. c., 23 Am. & Eng. R. R. Cases, 522. Declarations however of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who has heard them. *Ins. Co. v. Mosley*, 75 U. S. 397; *Hatch v. Fuller*, 131 Mass. 574; *Denton v. State*, 1 Swan, 279; *I. C. R. Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485; *L. N. A. & C. R. Co. v. Falvey*, 104 Ind. 409; s. c., 23 Am. & Eng. R. R. Cases, 522; 1 Greenl. Ev., § 102, and cases there cited; 1 Whart. Ev., § 268, and cases there cited. There are authorities seemingly opposed to this last proposition. *Reed v. N. Y. C. R. Co.*, 45 N. Y. 574; *G. R. & I. R. Co. v. Huntley*, 38 Mich. 537.

We think however that whenever evidence is introduced tending to show a real injury or a real cause for suffering or pain, as in this case, the declarations of the party concerning such suffering or pain while it exists and as simply making known an existing fact, should be allowed to go to the jury for what they are worth, and the jury in such a case should be allowed to weigh them and to determine their value. If they were made to a physician or surgeon while he was examining the party as a patient, for the purpose of medical or professional treatment, and for that purpose only, the declarations would be of great value. If, however, they were made

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at any other time or under any other circumstances, they might not be of such great value. If made casually to some person not a physician, and with whom the party had no particular relations, they might possibly in some cases be of but very little or no value. *Reed v. N. Y. C. R. Co.*, 45 N. Y. 574. Yet generally they should be permitted to go to the jury for what they are worth. *Ins. Co. v. Mosley*, 75 U. S. 397; *Hatch v. Fuller*, 131 Mass. 574; *Rogers v. Crain*, 30 Tex. 284; *Matteson v. N. Y. C. R. Co.*, 35 N. Y. 487; *Gray v. McLaughlin*, 26 Iowa, 279; *Kennard v. Burton*, 25 Me. 39; *State v. Howard*, 32 Vt. 380; *Lush v. McDaniel*, 13 Ired. 485; s. c., 57 Am. Dec. 566.

Also, if the declarations are made to a physician or other person merely for the purpose of obtaining testimony in the party's own case, they might be of very little value, and possibly might in some cases be wholly excluded. *G. R. & I. R. Co. v. Huntley*, 38 Mich. 537. But the mere fact that the declarations are made after suit has been commenced and while it is pending will not be sufficient to exclude the declarations, and generally they should be allowed to go to the jury. *Barber v. Merriam*, 93 Mass. 322; *Hatch v. Fuller*, 131 Mass. 574.

In the present case we cannot say that the court below committed any material error in admitting the evidence objected to. Every thing that the witnesses, Mrs. Thatcher and Mr. Pitzer, testified to was proved by the competent testimony of other witnesses. The injury, the impaired health, the suffering, the pain, and the entire condition of the plaintiff's body were fairly shown by evidence that cannot be questioned, and very nearly all the declarations of the plaintiff, as testified to by Mrs. Thatcher and Mr. Pitzer, were in substance declarations of present and existing pain, suffering, and conditions of the body, and not narratives of past pain, or suffering or conditions of the body; and to this extent they were unquestionably competent. Those declarations, if any, which were not concerning present and existing pain, suffering, and conditions of the body, were so small in amount and so trifling and insignificant in their influence, and were concerning matters which were so thoroughly and incontestably proved by other competent evidence, that their admission by the court could not be material error.

The judgment of the court below will be affirmed.

All the justices concurring.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

HAMBURG-BREMEN FIRE INSURANCE COMPANY V. GARLINGTON.

(88 Tex. 108.)

Insurance — "total loss" of building — ordinance prohibiting rebuilding.

If a building has lost its identity and specific character and has become unfit for use by fire, it is a "total loss." *

A city ordinance prohibited the repair or reconstruction of wooden buildings within specified limits, which had been injured by fire to the extent of one-third of their value. An insured building was partly destroyed, and the common council refused an application for leave to repair it. *Held*, a "total loss."

ACTION on a fire insurance policy. The opinion states the facts. The plaintiff had judgment below.

Crawford & Crawford, for appellant.

Leake & Henry, for appellee.

STAYTON, A. J. The rights of the parties must depend on the character of the loss sustained while the policy issued on January 23 was in force. The thing insured was a two story frame "building," on Main street, in the city of Dallas. By the term "building," used in the finding of facts, we understand to be meant a "house," which it is shown had been used as a "hotel." It was destroyed by fire, and if the loss was total, by reason of the fact

* To same effect, *Williams v. Hartford Ins. Co.* (54 Cal. 442), 35 Am. Rep. 77.

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that the building insured was thus so destroyed, that it ceased to be, within the meaning of the law, a building, then under the laws of this State, the policy evidences a liquidated demand against the appellant for the full sum for which the policy was issued. R. S. 2971; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

The court below found that the effect of the fire which occurred the day after the policy was issued was to reduce the building to a condition as follows: "The east wall of it was entirely destroyed. The roof was destroyed. Almost one-half of the interior of it (extending from the foot of the east wall to the top of the west wall) was destroyed. The front of it was partly lying on the street, and partly hanging, liable to fall at any time. Thus it had lost its specific character as a building, and was unfit for use as a hotel or for other purposes, and was a total loss, this loss being the combined result of the two fires."

It is unimportant to what extent the building may have been injured by the former fire, which occurred on January 4, 1884, while the property was covered by other policies; for settlement had been made in reference thereto, and those policies cancelled, and such injury can have no bearing on the question of liability under policies subsequently issued.

When the policy sued upon was issued, the property may have been seriously injured by the fire which occurred before that time, but such was the condition of the property when the policy sued upon issued, that the appellant insured it as a building, and such, in the absence of averment and proof of fraud in procuring the policy, it must be held to have been at the time the policy issued.

The question then is did fire so change the character of the thing insured, after the policy sued upon was issued, as to make a total loss of the building within the meaning of the contract of the parties?

The court below found that the building was a total loss, and we are of the opinion that the facts stated in the finding justified that conclusion. It was the building that was insured, a specific thing, and not merely the material of which it was constructed. In the case of *Williams v. Hartford Ins. Co.*, 54 Cal. 450; s. c., 35 Am. Rep. 77, the following charge was affirmed: "A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. Although you may find the fact that after the fire a large

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portion of the four walls were left standing, and some of the ironwork still attached thereto, still, if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy."

This we understand to be the true rule. *Nave v. Ins. Co.*, 37 Mo. 430; s. c., 90 Am. Dec. 394; *Judah v. Randall*, 2 Caines Cas. 324; *Huck v. Ins. Co.*, 127 Mass. 309; *Ins. Co. v. Fogarty*, 19 Wall. 640; *May Ins.* 421a; *Brady v. Ins. Co.*, 11 Mich. 446.

The fact that the court found that the total loss resulted from both fires cannot affect the liability of the makers of the policy in force at the time the total loss occurred. The fire which consummated the total loss did not occur until after the policy sued upon was issued; and the defective condition of the building, brought about and existing through the former fire, can no more be taken into the estimate in determining the cause of the total loss than could any other character of defect in the building existing at the time the last policy issued, and not of a nature to defeat the policy, but calculated from its character to make total loss from fire thereafter more easily accomplished. The maker of the policy cannot call to its aid the injury done by the former fire to make a loss subsequently resulting from fire only partial, which, in fact, through the latter fire only, became total.

The loss insured against was the loss to the building as it was at the time the policy sued upon issued, or as the building might be subsequently bettered, and its former condition could not be looked to for the purpose of determining the character of the loss, and the court might well have rested its holding that the building was a total loss from the last fire upon the specific facts found to be true. The court however, as will be seen from the conclusions of fact and law, based the total loss on both fires and the ordinance of the city which prohibited the rebuilding or repairing of wooden houses within the fire limits, which might be damaged to the extent of one-third of their value by fire.

The fifteenth conclusion of fact was: "That considered with reference to condition of the building at the time the second insurance was effected, the loss in this case was not a total one, although the loss occasioned by both fires and under the ordinances of the city preventing repairs to a building that has been damaged thirty-three and one-third per cent of its value, it was a total loss."

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Upon this conclusion of fact the court adjudged, in effect, that the loss resulting from the second fire and the operation of the city ordinance, which forbade the repair or rebuilding of the insured building, was a total loss, the natural and proximate result of the second fire had in contemplation by the parties at the time insurance was effected; and on this ground gave judgment as for a total loss. If rendering a judgment on the theory of total loss, the judgment, as it seems, was rendered for a less sum than it should have been, under the policy, this is a matter of which the appellant cannot complain.

After the second fire, application was made to the city authorities to repair the building, and such permission was refused on account of an existing ordinance, which forbade the repair or rebuilding of any wooden building within the fire limits, destroyed to the extent of one-third of its value by fire. No question is made as to the validity of such an ordinance. The case of *Brady v. Insurance Co.*, 11 Mich. 445, in its facts was almost identical with this, and in that case it was held that the parties having contracted in view of the city ordinance, which prohibited the reconstruction or repair of a wooden building, situated within the fire limits, unless by leave of the common council, which had been refused, the fire must be deemed the proximate cause of the loss, and the loss total. We see no reason to doubt the correctness of this conclusion. The case of *Brown v. Insurance Co.*, 1 Ellis & Ellis, 853, is substantially to the same effect.

From these views it is unimportant that the court below based its judgment on the ground last stated, and in effect held that the loss was not total except as considered in reference to the inability to repair or rebuild, in consequence of the extent of injury done by the second fire, which, of itself, under the specific facts found to be true, we hold, caused a total loss, without reference to the fact that the building, under the city ordinance, could not be repaired or reconstructed. In any event the judgment was right and must be affirmed.

Judgment affirmed.

Weider v. Maddox.

WEIDER V. MADDOX.

(65 Tex. 572.)

Conflict of laws — assignment for creditors.

A general assignment for the benefit of creditors, made in accordance with the laws of the debtor's domicile, will carry his personal property situated in other States, in the absence of express enactment in such States.*

ACTION on sheriff's official bond. The opinion states the facts. The defendant had judgment below.

Hyde Jennings and Carter & Wynne, for appellant.

Hogsett & Greene, for appellees.

STAYTON, A. J. On April 27, 1882, M. Spiro, who was an insolvent person, residing in the State of Missouri, in accordance with the laws of that State made a voluntary assignment of all his property for the benefit of his creditors, except such as by the laws of the State in which he resided was exempted from forced sale. The assignment was such as under the laws of this State regulating assignments of insolvent debtors, would be held valid if made by a person here resident, unless vitiated by the fact that the exempt property must be ascertained by the laws of the State of Missouri.

The assignment expressly covered a stock of goods situated in Forth Worth, Texas, at which place, as well as at the city of St. Louis, in the State of Missouri, Spiro was doing a mercantile business at the time the assignment was made. The goods at Fort Worth were seized by appellee, Maddox, who was the sheriff of Tarrant county, on the next day after the assignment was made, under attachments issued in suits instituted against Spiro by some of his creditors. This action is brought by the assignee, appointed by the deed of assignment, against Maddox and the sureties on his official bond, as sheriff, to recover the value of the property. The law of the State of Missouri, regulating voluntary assignments by insolvent debtors for the benefit of their creditors, is fully pleaded in the petition, and the assignment seems to have been made in conformity thereto.

* See *Butler v. Wendell* (57 Mich. 62), 58 Am. Rep. 329.

The petition alleges that the assignee qualified, by giving bond and doing such other things as were required by the laws of Missouri to authorize him to administer the estate, and that he had so qualified and was in possession of the goods, through agents, at the time the sheriff made the seizure. It is also alleged that the sheriff was notified of the right of the assignee at the time he made the seizure, and further, that Spiro did not owe and was not indebted to any citizen of Texas.

The defendants filed general demurrers to the plaintiff's petition, which were sustained and the cause dismissed. The grounds on which the court based its judgment do not appear in the record but the brief of counsel for appellees submits propositions in support of the ruling, which we may regard as the grounds upon which the court below acted. The propositions are as follows:

"1. An assignment, to be valid in Texas, must be filed and recorded as other instruments."

"2. The assignee, before taking possession of the property, shall give bond payable to the State of Texas, which shall be deposited with the county clerk."

"3. The laws of a State have no force beyond its territorial limits, and if permitted to operate in another State, it is only when neither the State nor any citizen thereof would suffer an inconvenience from the application or enforcement of such law."

"4. The rule that the law of the domicile of the person making a transfer of personal property, will control, is subject to many exceptions, and the law of the place where the property is situated will be looked to and control when ends of justice require it."

"5. It would only be on a principle of comity that the courts in Texas would enforce an assignment made in Missouri under the laws of said State, and not then when it would thereby prejudice any citizen or this State."

"6. An assignment of property for the benefit of creditors, made under an insolvent debtor's law of a particular State, which law also makes provisions for the administration of the estate assigned according to its own law and in one of its own courts, and places the assignee under the control of said court, is inoperative to vest in the assignee the title to property situated beyond the limits of the State in whose courts said estate is to be administered. In such case the assignee is virtually a receiver, and cannot act beyond the jurisdiction of the court under the control of which he acts."

The assignment in question is what is properly termed a voluntary assignment. It was not made in obedience to a law which compelled the assignor to make it, or which exacted from the creditor a surrender of any demand against the debtor in consequence of it, or as a condition to be allowed to take benefits under it. The right to make such assignments, if made *bona fide*, is not derived from statutes, but existed at common law, and now, in most of the States of this Union, laws have been enacted to regulate, control and secure the faithful execution of the trust by the named assignee.

The assignee acquires title and authority through the assignor, whose act is in the nature of a contract, and the acceptance of it by the assignee, imposes upon him a relation of trust and confidence as to creditors and the assignor. Such assignments are termed voluntary assignments, from the fact that they are the products of a will acting without legal compulsion, and to distinguish them from such transfers as are made solely by operation of law, or by an assignor under legal compulsion. The one has effect as other contracts, while the other has effect solely by force of the law which makes or compels the assignor to make the assignment. This difference it is important to observe when considering the effect to be given to an assignment in a State other than that in which it is made.

If it be an assignment under a compulsory statute, it exists alone by force of the law which cannot operate extra-territorially. The law is compulsory if it requires the assignment to be made even at the request of creditors, or if it provides for the discharge of the claims of creditors, without their consent, upon the voluntary surrender by the debtor, under the terms of the law, of all his property for the benefit of creditors. State insolvent laws which compel the insolvent debtor to surrender his property to an assignee, to be administered under the direction of a court for the benefit of creditors, and which compel the creditor to release the debtor on such full surrender, are instances of these classes. In America such assignments are held inoperative upon property, real or personal, not situated within the territory over which the laws that make, or compel the debtor to make them, have dominion, as are discharges of the debtor, attempted to be made under them, inoperative, as to persons not resident in the State, under whose laws they are made. Whart. Conf. Laws, 390, 390a; Story Conf. Laws, 410, 416; Bur-

rill Assignments, 303; *United States v. Bank*, 8 Robinson, 414; *Hutchinson v. Peshine*, 16 N. J. Eq. 170; *Felch v. Bugbee*, 48 Me. 9; s. c., 77 Am. Dec. 203; *Walters v. Whitlock*, 9 Fla. 95; s. c., 76 Am. Dec. 607; *Ogden v. Saunders*, 12 Wheat. 213; *Harrison v. Sterry*, 5 Cranch, 302; *Willots v. Waite*, 25 N. Y. 583; *Holmes v. Remsen*, 20 Johns. 265; s. c., 11 Am. Dec. 269; *Abraham v. Plesoro*, 3 Wend. 538; s. c., 20 Am. Dec. 738; *Dalton v. Currier*, 40 N. H. 247; *Saunders v. Williams*, 5 N. H. 214; *Blake v. Williams*, 6 Pick. 285; s. c., 17 Am. Dec. 372.

It seems however to be everywhere admitted that a general voluntary assignment, for the benefit of creditors, made by an insolvent debtor, in accordance with the laws of the place of his domicile, will pass all his personal property, wherever situated, unless the operation of such assignments is limited or restrained by some law of the State in which the property is situated. *Hanford v. Paine*, 32 Vt. 442; s. c., 78 Am. Dec. 586; *United States v. Bank of the United States*, 8 Robinson, 414; *Rosenthal v. Mastin Bank*, 17 Blatch. 323; *Law v. Mills*, 18 Penn. St. 165; *Whipple v. Thayer*, 16 Pick. 25; s. c., 26 Am. Dec. 626; *Black v. Zacharie*, 3 How. 514; *Green v. Van Buskirk*, 7 Wall. 150; Story Confl. Laws, 383-390, 410-416; Burrill Assignments, 301, 302, 306, 307; *Walters v. Whitlock*, 9 Fla. 86; s. c., 76 Am. Dec. 607; *Holmes v. Remsen*, 20 Johns. 265; s. c., 11 Am. Dec. 269; *Saunders v. Williams*, 5 N. H. 214.

That a voluntary conveyance of personal property, made in accordance with the law of the domicile of the assignor, is valid elsewhere, is the general rule, cannot be denied, and when it is claimed not to be so in a given case, the law of the *situs* must be looked to, for it is the right of every sovereignty to determine what shall be requisite to the transfer of property, real or personal, situated within its territory, and what remedial rights in reference to it shall exist. The laws of a State which will control such questions are ordinarily those made for the government of its own citizens in making contracts and asserting rights. This is well illustrated in cases in which a controlling effect was given to the law of the place where the property was situated. The following are cases of that character: *Green v. Van Buskirk*, 5 Wall. 307; 7 Wall. 141; *Guillander v. Howell*, 35 N. Y. 657; *Olivier v. Townes*, 2 Martin (N. S.), 93; *Rice v. Courtis*, 32 Vt. 460; s. c., 78 Am. Dec. 597.

There are expressions to be found in many opinions from which the inference may be drawn that effect is to be given to such volun-

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tary assignments by courts in States other than that in which they are made, only as a matter of comity—that it rests in the discretion of such courts to give or deny effect to such assignments as they may or not appear injurious to the rights of citizens of the State, whose laws the courts administer, and within whose limits the property may be situated. This seems to us to confer upon the courts a power too little restricted, too undefined and unlimited to be tolerated in any country governed by laws. What upon such a matter is to be deemed injurious to the rights of the citizens of the State in which the property is situated, should be the subject of legislative, and not of judicial discretion. Story Conf. of Laws, 390; *Guillander v. Howell*, 35 N. Y. 659.

That the assignment was made in the State of Missouri is a matter of no importance, as its validity does not depend upon any local law of that State, but is based on the common-law right of an insolvent debtor to make an assignment of all his property, subject to the payment of his debts, for the benefit of his creditors. It is not denied that the assignment is valid in the State of Missouri, and its form and manner of execution are such as to make it valid here, even under the statutes in this State regulating such assignments, unless invalidated by the fact that it makes the kind of property and its value, which is reserved from the operation of the deed, to depend upon the laws of Missouri regulating exemptions.

The laws of this State provide that an assignment of this character shall “provide for a distribution of all his (the assignor’s) real and personal estate other than that which is exempted from execution,” but it does not provide that the measure of the exemption shall be furnished by the laws of this State. The same general policy of permitting insolvent debtors, who make such assignments, to except from their operation such property as is exempted from execution, prevails in this State and in the State of Missouri. It cannot be said that that reservation made in the deed of assignment under consideration is in violation of the laws of this State, nor that it could prejudice the right of any citizen of this State who may be a creditor. Such a reservation would neither enlarge nor diminish the general fund to which creditors might resort through the ordinary process of the law to collect their debts, and were their creditors here, they would have no superior right to be paid out of the proceeds of property here situated had there been

no assignment made, unless they had acquired liens. All creditors, wherever resident, have equal right in this respect

Exemption laws have application to persons resident in the State in which they exist, and when an assignment conveys property in that and another State, it would seem that the exemption should be measured by the law of the domicila. If this were a compulsory assignment, dependent for its validity upon a statute of the State of Missouri, it is evident that the courts of this State would not give effect to the law of Missouri regulating exemptions. *Bryant v. Young*, 21 Ala. 264; *Newell v. Hayded*, 8 Clarke (Iowa), 143; *Helpenstein v. Cave*, 3 Clarke (Iowa), 289.

Whether a deed of assignment made in another State, by a person there domiciled, is sufficient to pass title to property here situated, must be determined by the same rules which relate to instruments transferring property for other purposes. If the instrument be such in form and manner of execution as is required by the laws of this State to pass title, then the title to property here situated must be held to pass to the assignee by it, in the absence of some law, in force here, prohibiting such transfers. When an assignee accepts the trust created by such an instrument, the title to the property passes to him for the purposes of the trust — he becomes liable for it, whether he has complied with the requirements or the law of this State, made to secure the due execution of the trust or not, and for an invasion of his right to the possession he may have his action.

The right is generally conceded to the person who has title. The recording of the deed of assignment is required by the laws of this State for the purpose of giving notice to all persons of its existence, but there is no intimation in the statute that without such record the assignment, if made in this State, would be void. An assignee is also required by the laws of this State to give a bond, but it has never been held that the giving of such a bond is necessary to the validity of the assignment.

So far as we are advised, it has been generally held in cases of voluntary assignments, made by non-resident debtors, embracing property in a State or States other than that of the domicile, that the assignment will be deemed valid if it be sufficient, under the law of the domicile, and under the law of the country in which the property is situated, to pass title; notwithstanding the law of the *situs*, intended to regulate the due administration of trust property,

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be not complied with; that such laws are only intended to affect, and do only affect, assignments made by persons resident in the State in which they exist. *Hanford v. Paine*, 32 Vt. 443; s. c., 78 Am. Dec. 586; *Ockerman v. Cross*, 54 N. Y. 32; *Chaffee v. National Bank*, 71 Me. 524; s. c., 36 Am. Rep. 345.

The fact that the assignee is required by the laws of the State of Missouri to administer the estate in his hands under the direction of a court of that State, can have no bearing upon the question of the validity of his assignment. As delivery is not necessary in this State to the transmission of title to personal property, we have not deemed it necessary to consider the rights of the assignee, growing out of the possession he is alleged to have had at the time the goods were seized. Nor have we deemed it necessary, in this opinion, to consider the averment that the assignor was not indebted to any citizen of Texas; for if it should appear that he was so indebted, it would not change the result, in the absence of some law of this State prohibiting the voluntary assignment of personal property, here situated, by its owner, resident elsewhere.

It is also unnecessary to consider what remedies creditors might have in this State to enforce the due execution of the trust in so far as it affects property here. From the averments of the petition, we are of the opinion that the property was not subject to the attachments levied upon it, and that the court below erred in sustaining the demurrer to the petition, and for this reason the judgment will be reversed and the cause remanded.

Reversed and remanded.

STUART V. WESTERN UNION TELEGRAPH COMPANY.

(66 Tex. 580.)

Damages — non-delivery of telegram — injury to feelings.

In an action for non-delivery of a telegram, whereby the plaintiff was prevented from seeing his brother in his last illness and attending his funeral, compensation for injury to the feelings may be recovered, where the company was notified of the emergency.

ACTION of damages for non-delivery of a telegram. The opinion states the case. The defendant had judgment below.

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John T. Pierce, W. H. Pope, and T. P. Young, for appellant.

Stemmons & Field, for appellee.

ROBERTSON, A. J. The appellant, who was the plaintiff in the court below, sued the appellee for damages and recovered a judgment for \$2,500. The appellee made a motion for a new trial, which was overruled, and the court below then of its own motion arrested the appellant's judgment and set it aside on the ground that the petition was insufficient in law to sustain a judgment. From this judgment the appellant appealed, and the only question presented is upon the sufficiency of the plaintiff's petition.

The appellant alleged in his petition that he was a citizen of Harrison county, and appellee was a body politic duly incorporated, which was represented in said Harrison county by J. P. Morrison, its local agent, and that appellee operated and owned on February 3, 1883, a telegraph line from the city of Marshall, in said county, to the city of Waco, in McLennan county, Texas, and for hire, transmitted telegrams for the public between said points. Appellant being informed in Waco, where he then resided, that John E. Stuart, his brother, who lived in Marshall, was there sick, he instructed G. W. Stuart, another brother of his who also resided in said city, to inform him by telegraph of his brother John's condition; that said G. W. Stuart, as appellant's agent, on February 3, 1883, delivered to the agent of appellee in Marshall, a telegram, as follows:

“MARSHALL, TEXAS, Feb. 3, 1883.

“To C. B. Stuart, Jr., Waco, Texas, care of Stuart & Harris, attorneys. John is very low, come on first train.

“G. W. STUART.”

That at the time of delivering to the agent the message he paid fifty cents, the customary charges for transmitting the same, and informed the agent of the circumstances requiring the speedy transmission and delivery thereof; that the message was correctly transmitted and received at appellee's office in Waco, by its agent, at three o'clock, P. M., on February 3, 1883; that being in a state of anxiety and momentarily expecting a telegram from his agent, G. W. Stuart, appellant in person called at the office of appellee in Waco, at four o'clock, P. M., on February 3, 1883, and asked the agent of appellee if any message had been received by him for ap-

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pellant and that the agent told him that none had been received; that he then informed the agent that his brother was sick in Marshall and that he was expecting a telegram from there in reference to his condition, and that if it should come to send it to his office, informing him at the time where his office was. Not having received any telegram he again, about nine-o'clock on the morning of February 4, 1883, called at appellee's office in Waco and asked if any message had been received for him, and was told by the agent of the appellee that none had come; that he again instructed the agent to send the telegram, if it should come, to his office; that on the morning of February 5, 1883, the telegram above set out was delivered to him, and that he immediately started for Marshall and travelled as speedily as he possibly could, but when he arrived his brother John had died and was buried; that if the telegram had been delivered to him when he called for it on February 3, he could have reached Marshall in time to have seen his brother alive; and that if he had received it when he called for it on the morning of February 4, he could have reached Marshall in time to have attended the funeral services of his brother; and in consequence of all of which he had suffered great disappointment, grief and mental anguish. Appellant also alleged that he was on February 3, and had been for some time a practicing lawyer in Waco; that his office was in speaking distance of the defendant's office, and that he had his card in the *Waco Examiner*, a paper having a wide circulation in that city, and his sign as such lawyer, was suspended over the pavement in front of his office in full view of all persons passing; and that he had repaid to G. W. Stuart the amount he paid the appellee's agent.

These averments disclose a contract between the appellant and the appellee, by the terms of which the appellee, for a valuable consideration, bound itself to deliver to appellant, promptly, the message described, a breach of this contract on appellee's part and actual damage sustained by the appellant, at least in the sum paid to appellee as the consideration for transmitting the message. For the breach of the contract the appellee was liable at all events for nominal damages. *Tel. Co. v. Dryburg*, 35 Penn. St. 298.

But the only averments in the petition which can at all sustain the amount of the judgment rendered are those which describe the harrowing effects upon the feelings of appellant as the result of the negligence of the appellee. Appellant's agent at Marshall,

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when he delivered the message for transmission, fully informed the appellee of the meaning of the telegram and the importance of promptly delivering it. The poignant distress suffered by the appellant was therefore proximately, and in the contemplation of appellee, caused by, and under the painful circumstances described, naturally would result from, the appellee's negligence.

The petition does not disclose a case for exemplary damages. The rule as stated in *Tel. Co. v. Brown*, 58 Tex. 170; s. c., 44 Am. Rep. 610, perhaps needs to be qualified; but tested by the rule most liberally interpreted in behalf of appellant, no such case is shown as would justify the court in punishing appellee for the wrongful acts of its agents. Unless therefore injury to feeling is a proper element of actual damage the petition does not sustain the judgment. It was determined by this court in the case of the younger Levy (59 Tex. 547) that we have no forms of action or technical rules, which can prevent the plaintiff, upon a statement of the facts of his case as authorized by our system of pleading, from recovering all the damages shown to be sustained. If the facts stated show a breach of contract, and also, that the breach is of such character as to authorize a suit as for a tort, all the damages recoverable for the thing done or committed, either in an action *ex delicto* or *ex contractu*, may be recovered in the one suit. It is claimed by counsel for appellee that injury to feelings in this kind of suit is held by this court in both the Levy cases (59 Tex. 543; s. c., 46 Am. Rep. 269; 59 Tex. 563; s. c., 46 Am. Rep. 272) to be exemplary damages. We do not so understand either of those authorities. In the elder Levy case it was held that one not entitled to recover nominal damages, as for a breach of contract, nor sustaining any damage to his person, name or estate, could have no recovery for mental distress alone. In that case the telegraph company had no contract with Levy, had broken no engagement with him nor violated any contract it had made with any one else for his benefit. It owed him no duty, and violated no right of his, and though its conduct may have outraged his sensibilities, it had done him no legal wrong.

In the other Levy case, the petition was excepted to on the ground that it showed no facts constituting a basis of damages; the exceptions were overruled; the plaintiff recovered, and the defendant, appealing, assigned as error the action of the court in overruling the exceptions to the petition. The petition, like that

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in this case, was a statement of the facts regardless of the forms of action. "Upon the whole case, as made by the petition and evidence," this court held, "that the appellee was entitled to recover whatever damages the proof may justify over and above such sum as he paid for the transmission of the message, and this in the way of exemplary damages," if a case for such damages is made. Whether the damage arising from mental distress was actual or exemplary, was not discussed or decided, but it was held that such damage, which in that case, as in this, was mainly the basis of the suit, could be recovered. "Otherwise, in a large class of cases, most grievous wrongs may be inflicted in matters as vitally affecting the welfare of individuals, as in other matters to which a pecuniary value, a market price, can be fixed; and this, in disregard of a duty voluntarily assumed to the public, to secure the due performance of which, many privileges, not possessed by persons generally, are conferred by the State upon the offending party." That mental suffering, resulting from an indignity to the person is actual damage, is held by this court in the case of *Hays v. Railroad Co.*, 46 Tex. 272. Pain of mind, anxiety and all the forms of distress peculiar to a sentient being, have been held elements of actual damage in suits for injuries to the person through the negligence of others. Our own reports contain many such cases. But it is claimed that in those cases the mental is an incident of bodily pain, and that without the latter the former cannot be considered as actual damage. In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case, not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in the doing of the wrongful act, is the principle of the liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness, as well as by a wound to the person. In cases of slander and libel, injury to the feelings is actual damage (3 Suth. Dam. 645 *et seq.*); it is the natural result of the wrongful act. The appellee knew, according to the averments of the petition, that in delaying the delivery of the message it had undertaken to transmit, it was denying appellant the opportunity he had contracted with appellee to afford him, to be with his dying brother in his last hours, and to comfort, by his presence, the bereaved mother. No press of business, nor pecuni-

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any interest could excuse his absence on such occasion. In the proper feeling of all men, not brutalized, the call upon him was superior to the engagements that usually occupy the time and absorb the minds of men. Having full knowledge of the situation, the duty of appellee to deliver promptly the message was correspondingly high. Damage for the breach of such a duty is not fifty cents. For so small a sum, appellee with its great facilities, procured, in part, by the State's aid, had contracted to do the appellant a great service. The appellant loses not the price, but the thing paid for, which was estimated in the judgment below, and on the pleadings, not excessively, at \$2,500.

In the *So Relle* case, 55 Tex. 310; s. c., 40 Am. Rep. 805, it was held that injury to the feelings was actual damage, which could be recovered though no other was sustained. That authority was overruled in the elder *Levy* case, only in so far as it held that such damage alone would sustain an action. The two cases conflict in but this one point. We find no case, except *So Relle*, which holds that a party may come into court solely to redress an injury to his feelings. Such injury is not to the name, person or property; but if to either of these an actionable injury is done, the complaining party may then recover, as actual damages, compensation for the proximate results of the wrongful act. When injury to the feeling is such result, it forms an element of the actual damage. *Ry. Co. v. Randall*, 50 Tex. 261; *Field Dam.* 76; *Craker v. Ry. Co.*, 36 Wis. 657; *Smith v. Overby*, 30 Ga. 241; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 17; *Cooley Torts*, 646; 1 *Suth. Dam.* 17, 18.

The petition disclosed a good cause of action, sufficient, if the facts averred were proved, to sustain the judgment rendered. If the facts averred were not proved, the motion for a new trial should have been granted. If the action of the court in overruling that motion was not satisfactory to the appellee, he ought to have excepted, have caused a statement of facts to be embraced in the record, and have assigned error.

The judgment of June 26, 1884, arresting that of May 2, 1884, was erroneous, and will be reversed, and as that of May 2 is sustained in the only particular in which it is complained of, it will be reinstated (5 *Leigh*, 388; *Hoggland v. Cothren*, 25 Tex. 346), and these orders be certified below for observance. It is so ordered.

Reversed and rendered.

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ON MOTION FOR A REHEARING.

STAYTON, A. J. This action was brought to recover damages for a breach of contract made by the parties to this action. The contract fixed upon the appellee the duty to perform certain services for the appellant, services public in their nature by reason of the nature of the employment which the appellee had voluntarily assumed, and for a violation of this duty, the appellee became liable to the appellant for whatever damages necessarily resulted, or which, from the nature of the contract and the known purpose for which the service was sought, were likely to accrue by reason of its breach.

The sole ground on which a rehearing is asked is, that damages compensatory in character are not given by the law for an injury to the feelings, directly resulting from a breach of contract or violation of duty; that damages resulting from such grounds are only recoverable when a case is made authorizing exemplary damages; that damages for injury to the feelings are punitive and never compensatory. We have no disposition to enter into a discussion of the vexed question, whether the recognition of a rule which gives to an individual damages for punitive or exemplary purposes, and not merely as compensation for an injury received, is in harmony with a rational administration of the laws pertaining to the adjustment of rights between man and man.

It may be, and is most likely true that the whole doctrine of punitive or exemplary damages has its foundation in a failure to recognize, as elements upon which compensation may be given, many things which ought to be classed as injuries entitling the injured person to compensation. The elements of injury for which damages compensatory may be given, vary in their character. To some of these the means for ascertaining the compensation which ought to be given, is such that it may be fixed with almost mathematical certainty, while as to others, this degree of certainty cannot be reached.

At some periods the tendency was to restrict the recovery of damages compensatory to such matters as were susceptible of having attached to them an exact pecuniary value, the dollars and cents lost as the result of a breach of contract or tort. At the present time however the fact that it may be found difficult to ascertain the exact amount of compensation which ought to be made for an injury resulting necessarily from the act of another, is not considered as any sufficient reason why compensation should not be given.

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The question in any case is, has injury necessarily resulted to the person, property or reputation of one person from the act of another, violative of a right secured by contract or the general law of the land? If so, the act violative of right, being the proximate cause of the injury, the person who thus suffers injury is entitled to damages to compensate him for this, whatever may be the elements which make up the injury and form the basis for damages. If one person be unlawfully wounded by another, the damages he may recover as compensation will not be restricted to such sums of money as may be equal to the value of time lost, money necessarily expended in treatment with a view to recovery, and other like matters; but the physical pain resulting from the wounding enters into the estimate as a factor calling for compensation, more or less, as the pain may have been slight or severe, or of short or long duration.

If such a wounded person's condition, resulting from the unlawful act, be such as to cause mental suffering, this is also to be taken into estimate. Why? Is it because the mental suffering is brought about by a maimed or disabled condition, for which of itself compensation must be made? Certainly not; physical pain is no more real than is mental anguish.

If one person is unlawfully so wounded by another that he loses a limb in consequence thereof, and this is attended with physical pain, compensation must be made for the latter injury, simply because it is the necessary, natural or probable result of the unlawful act. If in addition to the physical pain, the maimed condition of the same person, or the circumstances under which he is placed by the wounding, bear as necessary, natural or probable fruit, mental suffering, this is also matter for which compensation must be given; but the right to compensation for the one injury has not its foundation in the existence of the other.

Each of these elements for damages goes back to a common source of right to compensation — the act of the violator of a right secured by contract or the general law of the land; and whatsoever necessarily results to the injured person from the act so violative of his right must give legal claim for compensation; and his right to this cannot be made dependent upon the motive with which the unlawful act is done, nor upon other circumstances which are ordinarily held to be sufficient to authorize the imposition of damages termed punitive or exemplary.

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In *Ry. Co. v. Levy*, 59 Tex. 563; s. c., 46 Am. Rep. 372, it was held that one who had not fixed upon a telegraph company, by contract, the duty to deliver a message, could not maintain an action for damages for the failure to promptly deliver it, upon the mere averment that such failure had caused him mental distress. In that case authorities were cited illustrating the extent to which courts and elementary writers had gone in support of the rule that mere mental suffering was not sufficient to enable one person to maintain against another an action, based on negligence, when neither by contract nor positive law was a duty fixed to do for him the act alleged to have been negligently performed.

It was not necessary in that case that we approve or disapprove of all that was asserted to be the law in the authorities cited, nor were we then called upon to declare whether mental suffering resulting from the negligent performance of a duty, fixed by contract or positive law, was an element entitling the injured party to damages compensatory. In *Ry. Co. v. Levy*, 59 Tex. 543; s. c., 46 Am. Rep. 269, which was somewhat similar in its facts to the case before us, it was held that the action could be maintained, and that the injured party was entitled to recover any damages which the proof might justify, besides such sum as was paid for sending the message, and that he might recover exemplary damages, if the negligence of the telegraph company was willful or gross.

There was however no intimation, in that case, that damages, such as are termed exemplary, were the only damages the plaintiff might recover other than the sum paid for the transmission of the message; but it was suggested that it would be necessary for the plaintiff to show a case entitling him to actual damages to entitle him to recover damages exemplary. The case last referred to was before this court a second time, and there is much in the opinion then given which we deem inconsistent with the rules of law applicable to such cases. We see no reason to doubt that the case now before us was correctly disposed of by the original opinion, which more fully considers all the questions involved in the case, and the motion for rehearing will be overruled.

It is so ordered.

Motion overruled.

I. & G. N. RAILWAY COMPANY V. FOLLIARD.

(33 Tex. 608.)

Carrier — passenger — ejection — contributory negligence.

A railway passenger was ejected from a car at one end of a trestle, and his gun, which was in the baggage car, at the other. He crossed to get it, and in returning, fell and was injured. *Held*, that the company was not liable therefor.

ACTION for personal injury. The opinion states the facts. The plaintiff had judgment before.

John Young Gooch, for appellant.

Marsh Glenn and *John J. Word*, for appellee.

GAINES, A. J. Appellee being a passenger on appellant's road, with his gun, going from Palestine to Long Lake, was carried past the latter station a short distance and put off on the trestle across the Trinity river near its east end and his gun put out on the embankment after the train had crossed to the west end. He walked across the trestle and got his gun, and in crossing back with it his foot slipped and he fell upon the cross-ties and received an injury for which he obtained a verdict and judgment in the court below. Appellee testified, that when he approached the train to take passage, he was met at the door of the passenger coach by a servant of the company and told that he could not take his gun into the coach, but must place it in the baggage car. He went forward to the car next to the tender, which was the first he saw open, and, seeing a man in the car, delivered the gun to him to be carried to his destination, after paying the person twenty-five cents, which he demanded. There was evidence tending to show that the man who received the gun was the agent of the express company. Appellee testified, in effect, that he took him for the servant of the railroad company.

The court charged the jury in substance, that if appellee placed the gun in charge of the express company on the train, relying upon the railroad company to deliver it to him, and the latter's servants knew this, then the railroad company was bound to deliver the gun or allow time for its delivery at Long Lake; and re-

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fused a special instruction asked by appellant, to the effect that if appellee placed his gun in charge of the express company to be carried to his destination, then the express company was responsible for its safe delivery and appellant could not be held liable for an injury resulting from its being put off the train at an improper place. The action of the court in reference to these charges is assigned as error; but we think the point raised by these assignments is not well taken.

It was the duty of the railroad company to take charge of defendant's gun upon their servants being apprised of his wish to have it carried with him, and if the company's servants neglected to do this, but directed him to place it with the baggage on the train, and if, in attempting to do this, he, by mistake, delivered it to the agent of the express company, we think appellant as much bound for its delivery as if it had been placed directly in charge of its own servants. To hold otherwise would be to permit a carrier to neglect a duty imposed upon him by law, and thereby relieve himself of a responsibility which would have attached to him in case that duty had been performed. No one should be allowed in this manner to take advantage of his own wrong.

It is also assigned as error that the verdict of the jury is contrary to the law and evidence, because the evidence showed that the train stopped at Long Lake a sufficient length of time for defendant to alight and get possession of his gun; that he failed to do this, and that his own negligence in this regard was the cause of his being put off on the trestle. Upon the question whether the train stopped at the station or not, the evidence was decidedly conflicting. It was the peculiar province of the jury to weigh the testimony and determine the question, and their verdict will not be disturbed in this court, in such case, where there is sufficient evidence to support the finding.

But the more serious question presents itself, whether under appellee's own testimony as to the causes which led immediately to the injury complained of, he has any right to recover of the company. He was put off the train in the day-time and had ample opportunity to deliberate as to the course best for him to pursue under the circumstances. He crossed the trestle for his gun, and in going down the embankment got mud upon his feet. He testified further that by reason of this mud his foot slipped in crossing back and he fell upon the cross-ties and thus received the injury. It

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would seem that when his gun was put off, the conductor suggested that he could cross the trestle and get it. It is held that where a passenger is told to alight from a train by the conductor, and the passenger being suddenly put to his election whether he will be carried past his destination or alight from a car in motion, does alight and receives an injury, he is not necessarily guilty of contributory negligence. But the case before us presents no such sudden emergency. And even admitting, for the sake of the argument, that appellee was not negligent in crossing the trestle in the first instance, can it be said he exercised ordinary prudence in attempting to recross with muddy feet? He must have seen the danger and could have avoided it, and if he saw proper to take the chances of crossing in safety, the railroad company cannot be held responsible if he was injured in the attempt.

For any loss that occurred to him by reason of his being put off on one end of the trestle and his gun beyond the other end, the company was liable to him. Appellant is responsible for loss or damage to appellee, which was the probable and natural consequence of the neglect of its servants in the particulars complained of, but is not responsible for injuries resulting from damages which a prudent man, with time to consider, would have avoided.

Because of the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

WILLIS V. MORRIS.

(86 Tex. 623.)

Trespass — measure of damages — negligence.

A judgment creditor purchased a tract of land with a factory and machinery on it, on sale under his execution, and continued to carry on the factory by the judgment debtor as agent, until it was destroyed by fire. The judgment debtor claimed the property as exempt, and sued for the land and the value of the factory and machinery. *Held*, that if the property was exempt and the fire was immediately caused by the defendant's negligence, the defendant was liable, but not otherwise.

ACTION to recover land and damages for wrongful seizure of building and machinery. The opinion states the case. The plaintiff had judgment below.

Willis v. Morris.

W. Q. & F. Reeves, for appellants.

Gammage & Gregg, for appellees.

GAINES, A. J. Appellees, Morris and Ragsdale, and one R. V. Simpson, composing the firm of Morris, Ragsdale & Simpson, mechanics and machinists, and being the owners of the lots sued for in this action, erected thereon a house with machinery and tools for the manufacture of cotton gins, etc. At one time all of them worked in the factory, but about the month of January, 1883, having established a general mercantile business, Simpson took charge of this business and gave it his principal attention. Morris superintended the factory and worked in it, and Ragsdale travelled in the interest of the firm, and when not so engaged, also worked in the factory. Appellants, P. J. Willis & Bro. and Mensing, Stratton & Co., having respectively obtained judgments against the firm of Morris, Ragsdale & Simpson, caused executions to be issued thereon and levied upon the lots in controversy, the machinery, tools, etc., therein situated, besides other property not involved in this suit. The sheriff took actual possession of the personal property levied upon and of the buildings placed upon the lots. The machinery, tools, etc., were sold by the sheriff on December 14, 1883, and the lots on the first Tuesday in January, 1884, appellants being the purchasers in both cases. After the sales all of the property went into the possession of appellants, who employed appellees, Morris and Ragsdale, and L. V. Simpson to operate the factory until the material on hand could be worked up. Morris was made superintendent, and the other two were to bestow their labor as mechanics in carrying on the work of the factory. Under this arrangement the factory was worked until the month of June, 1884, when it and its contents were destroyed by a fire, the cause of which was unknown. At the time of the levy of the executions upon the property each member of the firm was a resident citizen of Anderson county and the head of a family.

Simpson died before the institution of this suit, which is brought by his heirs, and Morris and Ragsdale, to recover the lots upon which the factory was located, and damages for the seizure and destruction of the buildings, machinery and tools found upon the lots, upon the ground that all of the property named was exempt from forced sale. The jury returned a verdict for the plaintiffs

for the lots and for \$6,250 damages, which evidently embraced the value of the entire property upon the lots, which was claimed by them as exempt, and probably rent of the premises.

The seventh assignment of error, which is the first relied upon in the brief of counsel, is as follows:

The court erred in declining to give first special charge requested by defendants, which is as follows: "It is admitted by plaintiffs and defendants that the factory, machinery, and other property in controversy in this suit was purchased by said defendants in an execution sale in favor of said defendants, Willis & Bro. If you find from the testimony that at the time of and prior to said sale, defendants had notice that Morris, Ragsdale & Simpson claimed said property as exempt and not subject to execution, and if you should find that said property was exempt, and should also find that said Morris, Ragsdale & Simpson, after the sale of said property, took charge of said factory and other property as agents or superintendents of defendants, and operated and conducted said factory, having control, charge and possession thereof, and that during said time said factory, machinery and other property was injured or destroyed by fire without the negligence or want of care on the part of defendants, then the said defendants would not be liable for such injury or destruction."

The point is, whether or not appellees had the right to recover the value of the property destroyed by fire. This is a momentous question to the parties to the suit. The value of this property is the bulk of the matter in controversy. A proper solution may depend in some degree upon the decision of the further question, what part of this was real and what part was personal property. Morris, Ragsdale & Simpson, the manufacturing firm, were the owners of the lots in controversy, and it is to be inferred from the record that they erected the building and placed the machinery in it, with a view to carry on a permanent business. The machinery was attached to the building.

The record shows that after the destruction of the factory, the lots were worth only \$75. These facts clearly indicate that the intention of the owners was to make the machinery a permanent accession to the realty, and that the land was of no material value for any other purpose. Under this state of case, as between a defendant in execution and a purchaser at sheriff's sale, this property would be deemed a part of the freehold. *Moody v. Aiken*, 50 Tex. 65; *Hutchins v. Masterson*, 46 Tex. 551.

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Conceding then for the present for the sake of the argument, that the lots were the homestead of the members of the firm, and exempt from forced sale, the question recurs, can appellants be held liable for the entire value of the realty at the time they took possession, and if not, can they be charged in damages for the loss of that which was destroyed by fire? In case of personal property wrongfully seized, the owner may treat it as belonging to the wrong-doer, and recover its value at the time of the tort. But as to real estate, no such rule prevails. When the owner of realty is dispossessed by a trespasser he must sue for the specific property, and may recover the value of the rents and all damages resulting in legal contemplation from the trespass. What are these damages? "The general rule is that the defendant is not answerable for any thing beyond the natural, ordinary and reasonable consequences of his conduct." 1 Suth. Dam. 57. The rule is thus stated both in Field on Damages, 591, and Eggleston on Damages, 124. Quoting from POLLOCK, C. B., in *Rigby v. Hewit*, 5 Exch. 243: "Every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct." Now can it be said that the destruction of the property in this case was the natural, ordinary and reasonable consequence of its being taken possession of by appellants? Certainly not. If it had been shown that the burning of the house and its contents was the result of their negligence after they took possession, then this, as a new wrong and intervening cause, would have rendered them liable. Not only is there an absence of any evidence tending to this conclusion, but, on the contrary, it appears that appellees themselves were put in charge of the property by appellants to operate the factory as they had previously done, and under the arrangement were in actual charge and control of it when the destruction occurred. Under the circumstances, if negligence could be imputed to any one, it would be to them. The cause of the fire is unknown, and certainly it is not known that appellants' conduct in any manner contributed to it.

Reasoning metaphysically, it might be argued that appellants' conduct in dispossessing the owners, broke the chain of successive events in relation to the property, changed its surroundings and set in operation a new series of causes and effects; and that in the absence of proof that the loss proceeded from some extraneous

cause, such as the act of God or an incendiary, it must be deemed the consequence of the change of the possession of the property. But as a legal argument this is not sound. To render appellants liable for the loss, the destruction of the property must have been caused directly and immediately by their acts, or must be the result of a series of causes and effects, proceeding one from the other, and not speculatively inferred, but established by evidence, as other facts are required to be proved.

The case of *Porter v. Miller*, 7 Tex. 468, cited both by counsel for appellants and those for appellees, is not a decision upon the point before us. It is there held, that when suit is brought for the specific recovery of a slave, and the slave dies pending the suit, "then if the possession of the defendant be inequitable and unconscientious, acquired for instance, in violation of a trust, or by force, violence or fraud," he should be held liable for the value of the property at all events. On the other hand the court say, "if he hold by title acquired in good faith, if his claim be not destitute of equity, or have probable foundation in law, if it be conscientious, he cannot be treated as a willful wrong-doer, not relievable even as against the act of Providence." We know of no decision which authorizes a suit for the value of real estate, upon possession being wrongfully taken. In case of personal property, if the owner so elect, he may, in the first instance, recover its value at the time of the conversion, irrespective of what may subsequently become of it.

It is not necessary therefore for us to determine in this case whether in the event this property was exempt, appellants were holding it by title acquired in good faith or in bad faith, according to the rule in the case last cited. For the reasons stated, we think the court erred in refusing the charge asked by appellants.

[Omitting minor points.]

For the errors pointed out, the judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.

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TEXAS AND PACIFIC RAILWAY COMPANY V. BRADFORD.

(66 Tex. 732.)

Master and servant — defective implements — contributory negligence.

When a master has furnished implements perfect of their kind but not designed for or adapted to the performance of his work, and a servant objects to using them on this account, but continues to use them, he will be held to have assumed the risk.*

ACTION for personal injuries. The opinion states the facts. The plaintiff had judgment below.

R. C. Foster and A. E. Wilkinson, for appellant.

E. S. Chambers, for appellee.

STAYTON, A. J. The appellee was foreman in charge of a section of appellant's railway, and had been working in that capacity for about six years before he was injured; was forty-six years old; had been railroading the most of his life, and from his own statement, understood that business.

He thus states the manner and cause of the injury for which he seeks to recover damages: "On March 5, 1884, the road-master passed over my section (66) going west on defendant's road, and ordered me peremptorily to straighten the rail, and told me that if I did not have it straightened by the time he returned that evening, he would find a man who would straighten it. Under these circumstances I attempted to straighten the rail with such tools as I had. I laid a tie across the railroad track and then took a crow bar and placed it at one end of the crooked iron rail, and then ordered the section hands to raise the iron rail up high, intending to let it fall across the tie, placed as above stated, so as to let the weight of the rail straighten itself by the fall. When they got it up as high as they were going to get it, they were to say 'high up' and then I expected to look out for the drop. It slipped, or something, and when the rail fell it jumped forward and caught me," etc.

The same official had several times before directed him to straighten the rail, which was very much curved, and he had objected to doing so because he "did not have the proper tools to

* See *Stroble v. Chic., etc., Ry. Co.*, ante, 456.

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straighten the rail with, and did not believe he could straighten it. We only had shovels, spades and track tools, and had no curving hook, an instrument used in straightening railroad iron rails."

He further stated that he "had no idea of any danger in the work, and only objected to undertake it because he did not think he could do it with the tools he had;" that a curving hook was a proper instrument to use in straightening crooked rails; that he had never been furnished with one and did not know that they were furnished by the road to section foremen; that he could have straightened the rail by heating it, but could not have done so by the time the road master returned that evening; that he had never seen a rail so crooked as the one he attempted to straighten straightened by section men, and that they were always taken to the shops for that purpose.

He further stated that the road-master instructed him how to straighten the rail, and that he followed his instructions.

The rail which he attempted to straighten was twenty-six or twenty-eight feet long. The road-master corroborated the statement of the appellee as to the orders given to him, and as to the tools he had, and he also stated that a curving hook was a tool necessary to straighten rails with safety.

The road-master further stated that he "did not consider the tools he had were sufficient to straighten the rail, but they were the only tools he had to use; it was a work of pressing necessity and had to be done as we were short of rails. I consider that there is danger in trying to straighten any rail without proper tools. * * * I did not think there was danger to the life of plaintiff in obeying the order." The order to the appellee to straighten the rail came from the road-master, who seems to have had charge of a division of the road, and he was ordered to have this done by the general road-master.

Several railroad men stated that the effort to straighten the rail in the manner attempted was imprudent and dangerous; but one witness stated that the method adopted was recognized as a proper one for such work.

It may be admitted, under the facts proved, that the appellant is liable, if an individual master who should direct such work to be done, under the circumstances, would be liable.

It is to be observed in this case that the injury did not result from the use of any tool, implement or appliance defective if con-

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sidered with reference to the use to which they were adapted, and for which they were ordinarily used. There is no complaint that the crow-bar, tie placed across the rails, or the rails which supported it were unsound, or in any respect defective when so considered; nor is it claimed that the fellow servants, who were assisting in the work, were not competent and suitable men in every respect for the employment in which they were engaged.

If the failure to furnish implements with which the work could be safely done be such neglect of duty in the master as would render him liable for an injury resulting from the use of implements not adapted to the particular work, but good of their kind and suitable for the purposes for which they were ordinarily used, as for negligence of the master in furnishing implements defective, then the knowledge that such tools were not suitable for the work undertaken would defeat a recovery by the servant, as fully as could this knowledge of the defective condition of implements which if proper in kind, would be suitable and sufficient for the safe accomplishment of the work to be done.

The liability of the master to the servant for injuries resulting from the use of defective implements arises from the fact that it is the duty of the master to furnish implements not defective, and a servant, unless the defect be patent, may assume that the master in this respect has performed his duty; but when he has knowledge that the master has not done so, if he continues in the employment in which such defective implements are used, he must, ordinarily, be held to assume the risks incident to the service as it is attempted to be carried on, and not to assume only the risks incident to such service when carried on with implements not defective of their kind and suitable to the work undertaken.

There can be no doubt that the appellee knew that the implements he had were not suitable in kind for the work required, for he assigned as a reason for not doing it when formerly requested to do so that he did not believe it could be done at all with the implements he had. He then certainly knew that the instrumentalities which he had were imperfect and insufficient when considered in relation to the work to be done. Of this his knowledge was as full as was that of any officer or servant of the company, for whose negligence in furnishing defective implements the company would be liable.

No question arises as to whether the injured servant had means of information as to unsuitable implements used. His own declara-

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tions show that, as to this, he was fully informed. He did not believe the work could be accomplished at all with the implements at hand. Such a belief, founded on facts patent, existing in the mind of a man having experience in relation to the matter to which the belief relates, is equivalent to knowledge. It is not the duty of a servant to assume and exercise the duties of an inspector that he may detect imperfections in implements not open to common observation, but if he knows of such imperfections, then it is incumbent upon him not to expose himself to dangers resulting from them; and if after such knowledge he exposes himself to such dangers, it must be held that he assumes the risk of receiving injury from the known defect, although the master, as well as the servant, had knowledge that the defective implement was used in the business.

It is frequently said that a servant must establish three propositions to entitle him to recover from the master for an injury received in the master's business:

"1. That the appliance is defective.

"2. That the master had notice thereof, or knowledge, or ought to have had.

"3. That the servant did not know of the defect, and had not equal means of knowing with the master." Wood Mast. and Serv. 414.

For the purposes of this case, it may be admitted that the appliances were defective, and that the master had knowledge of that fact; but it cannot be claimed that the servant did not know of it. It has sometimes been said, that to defeat the right of the servant to recover, he must not only know that the defects through which the injury resulted existed, but that he must also have known the danger. The case of *Ford v. Ry. Co.*, 110 Mass. 241, is frequently cited to sustain this proposition; but an inspection of the case shows that no such ruling was made. That was a case in which an engineer sought to recover for an injury caused by the explosion of the boiler of the locomotive which he was running, and it was shown to be in some respects defective. The court said, in passing on the propriety of the action of the trial court in refusing instructions, "it is plain that the plaintiff's knowledge that the engine was not in good working order, and was, to some extent, defective, is not conclusive evidence of want of due care on his part; it was for the jury to consider on the question of the alleged contributory negligence of the plaintiff; and they were told that if the plaintiff ran the engine when it was not in good working order, knowing t,

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and knowing that its condition was a sign of the defect which caused the explosion by which he was injured, or when, as a competent engineer, he ought to have known it, he could not recover."

This was simply an assertion that a defect which may not in any respect have caused the explosion, from which the injury resulted, could not be considered conclusive evidence of contributory negligence; but in illustrating the impropriety of giving the charge asked, the court referred to the charge given, and very properly held that if the engine was out of working order in such respect as to indicate that there was a defect which might lead to an explosion, then the engineer operating it, and knowing of the defect, could not recover.

The opinion we understand only to declare that knowledge of a defect, which, in the ordinary course of events — under the operation of well-known laws governing matter — may result in injury, will cast upon the person who, with knowledge of such defect, continues to use the defective implement or machine, the risks incident to the business done with the defective implement or machine; but there is nothing in the opinion to indicate that the engineer must have had knowledge of the danger of an explosion, otherwise than as he may have been affected with knowledge or notice by the defect itself, that such an event might occur.

In the case before us, as before said, the appellee had notice, and even knowledge, of the defects, if they can be so termed, of the implements which he was using, and he now alleges, and bases his case upon the fact, that the injury resulted from the use of the implements known to be defective before and at the time he attempted to use them. He knew the nature of the work to be done, and cannot be deemed to have been ignorant of natural laws, which made its execution dangerous if attempted with improper implements. He was not an inexperienced man. On the contrary, seems to have been a man of large experience, and from the nature of the employment in which he had been long engaged, must have fully appreciated the danger involved in handling heavy bodies with insufficient appliances. There was neither any hidden imperfection in the instrumentalities used nor danger to be foreseen, open to the observation of the agents of the appellant, but hidden to him. There was no sudden emergency calling for such speedy action as gave no time for full contemplation of the defects and the results that might ensue.

Texas and Pacific Railway Company v. Bradford.

It has sometimes been held, that although the servant may have been aware of the defect, yet if a man of ordinary prudence, on this account would not have refused to do the work, but would have continued in the service and have attempted to perform it, that then he may recover for an injury resulting from such defect.

It seems to us that such a rule is unsound; for if the servant, acting as a prudent man would ordinarily act, would undertake to do the work with knowledge of the defect, this very test relieves the master from liability; for the obligations and duties of master and servant are correlative; each is held to that degree of care, in reference to all matters affecting the safety of the servant while in the master's employment, which men of ordinary prudence would or ought to exercise under the same circumstances. If the servant, with a knowledge of the defect, as a prudent man, may undertake the work, can it be said that the master has not exercised that degree of care required of him? It would seem however that the appellee had knowledge even of the danger; for in detailing the manner in which the injury occurred, he stated that when the end of the rail reached the highest elevation to which it was intended to carry it, his assistants were to give the words which were to indicate that fact, "and then I expected to look out for the drop."

Why look out for the drop? Evidently for no other reason than that he knew there would be danger to himself in the fall of the rail—that he might be injured just as he was—and that on this account it was necessary for him to know just when the rail would fall that he might take such precautions as were necessary for his own safety. From his own statement of the matter, the inference is very strong, that the injury resulted from the fact that his fellow servants did not use due care or that the implements they had were not carefully used. What we have said indicates sufficiently our views of the law of this case, and it is unnecessary further to consider the several assignments questioning the correctness of several parts of the charge given. The charge seems to have been, in the main, carefully drawn, but parts of it were calculated to mislead the jury, if not erroneous.

We are of the opinion that the motion for a new trial should have been granted, and the judgment of the court below will be reversed, and the cause remanded.

Judgment reversed and cause remanded.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

BENN V. HATCHER.

(81 Va. 85.)

Deed — reservation — uncertainty.

A reservation of "three-fourths of an acre as a burying ground for the family and their descendants" is valid, and subsists although the whole tract is subsequently deeded without reservation.

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

Wm. B. Pettitt and A. C. Leake, for plaintiff in error.

Benjamin Nash and Jackson Guy, for defendant in error.

LEWIS, P. This was an action of ejectment in the Circuit Court of Goochland county. The case is as follows: By deed bearing date August 19, 1851, the widow and the children and devisees of Josiah Hatcher, deceased, conveyed to John T. Sublett a certain tract of land, situate in the said county, "reserving to the parties of the first part three-fourths of an acre as a burying-ground for the family and their descendants." The lot of ground thus excepted is the subject of this controversy. In the following year Sublett and wife conveyed the land to David A. and Frank J. Hatcher, two of the nine grantors in the first-mentioned deed, and by intermediate conveyances it is now owned by the plaintiff in

error, who was the defendant in the court below. In none of these subsequent conveyances, however, is there any reservation of the burying-ground, or any reference to the exception in the deed of August 19, 1851.

At the trial the defendant demurred to the evidence, and thereupon the jury returned a verdict for the plaintiffs, subject to the opinion of the court on the demurrer, and assessed their damage at the sum of \$500. Judgment was rendered in accordance with the verdict, and thereupon the defendant was allowed a writ of error and *supersedeas*.

The first objection urged by the latter is that the exception in the deed to Sublett is void for uncertainty. But this objection is not well founded. It is well settled that in such case the uncertainty may be cured by the election of the grantor, which however must be made within a reasonable time.

In *Dygert v. Matthews*, 11 Wend. 35, a deed was made conveying fifty acres of land, "reserving out of the said parcel of land so much as is necessary for the use of a grist-mill," etc. The court said that strictly an exception of a part of the thing granted is void, but an incident to the grant may be reserved. Therefore "this exception, as such, assuming it to be an attempt to reserve out of the grant one acre of land, is void; but construing it as a reservation of a mill-site, which is the obvious intent of it, it is valid, but inoperative until used for the purposes reserved." And further it said: "Until the right is exercised and the grist-mill built it cannot be ascertained with certainty what quantity of land will be necessary for that purpose, nor the precise location."

Nor is there any thing at variance with what is here said in the decision of this court in *Butcher v. Creel's Heirs*, 9 Gratt. 201, to which counsel have referred. In that case it is true the exception relied on was held inoperative, but not solely on the ground that the land intended to be excepted was not sufficiently described in the deed; for the court went on to say that if it might be identified by entry and taking possession, yet as no such entry had been made the action could not be maintained.

In the present case there is no doubt as to the precise three-fourths of an acre intended to be excepted. The evidence shows that long prior to the death of Josiah Hatcher, it had been set apart as a family burying-ground; that the whole, in course of time, became covered with cedars, bushes and other natural growth of the

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soil; that it was not more than seventy-five yards distant from the defendant's dwelling-house, and that its boundaries were plainly defined and unmistakable. It also appears that it was in the uninterrupted possession of the family for the purpose for which it had been set apart, until the defendant refused to permit the body of a deceased member of the family to be buried there, in the summer of 1882, a short time prior to the institution of the present suit. And this testimony was properly admitted as explanatory of the deed, and to give effect to the intention of the parties. 1 Greenl. Ev., § 275 *et seq.*; *Altman v. McBride*, 4 Strob. 208; *Worthington v. Hylyer*, 4 Mass. 196; *Wiley v. Sirdorous*, 41 Iowa, 224.

This being so, the plaintiffs contend that the lot in question was dedicated to the use expressed in the deed, and that this quality adhered to it, and was not affected by any subsequent alienation. In its technical legal sense dedication is the appropriation of land for a public use, as for a highway, a common, or the like, but may be effectual, it seems, when made to a pious or charitable use, though not distinctively a public one. It is not necessary that it should be by deed or in writing; it may be by act *in pais*; nor is it necessary that the fee should pass; for dedication has respect to the possession, and not the permanent estate. And where property is thus set apart an estoppel arises which precludes the owner from revoking the dedication; for the law considers that it would be in violation of good faith, and in some instances even sacrilegious, to reclaim at pleasure property which has been devoted to the use of the public, or in furtherance of some charitable or pious object. *Beatty v. Kurtz*, 2 Pet. 566; *Cincinnati v. White's Lessee*, 6 Pet. 431; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407; 3 Washb. Real Prop., marg. p. 459.

The present case stands on even higher ground. It stands on the solemn agreement of the parties themselves, that the lot in question should not only be excepted out of the deed to Sublett, but that it should be devoted in the future, as it had been in the past, to the use of the family as a place of burial for its dead. And the appropriation thus made was not for the separate use of the individuals respectively, who composed the family at the time, but for the family as a whole, and could not be relinquished or assigned, in whole or in part, except by the concurrent act of all for whose benefit it was intended. It follows therefore that no title to the premises in controversy was acquired by any of the conveyances

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subsequent to the deed to Sublett. *Pearson v. Hartman*, 100 Penn. St. 84; *Pierce v. Spafford*, 53 Vt. 394.

[Omitting minor questions.]

FAUNTLEROY, J., dissented.

Judgment affirmed.

LINKENHOKER'S HEIRS V. DETRICK.

(81 Va. 44.)

Homestead — waiver of exemption — constitutional law.

In the absence of express constitutional prohibition, a statute authorizing the waiver of a homestead exemption, whether made before or after the property is set apart, by an agreement to that effect in the contract or evidence of debt, is valid.

THE opinion states the case.

G. W. & L. C. Hansbrough, for appellant

Glasgow & Glasgow, for appellees.

HINTON, J. By deed dated December 11, 1871, and duly recorded, James R. Linkenhoker of the county of Botetourt, declared his intention to set apart and hold as a homestead for the benefit of himself and family, under the provisions of the Constitution and laws of this State, certain real estate situated in said county, of the value of \$1,700, and certain personal property of value sufficient to make the realty and personalty amount to \$2,000.

In the years 1879, 1880 and 1881, Linkenhoker contracted several debts to L. F. Detrick, John S. Reese & Co., and others, by bond or note, wherein he waived the homestead exemption. He died in January, 1882, leaving eight children, the six youngest being infants under twenty-one years of age. He also left two other parcels of land and some other personal property. All together however was insufficient to pay his debts.

This suit was then brought to settle his estate and to subject his realty to sale to pay his debts, and in it the question was raised whether or not the waiver of his homestead by Linkenhoker, in bonds executed by him since the recording of his homestead deed in 1871, was valid and binding on his estate. And this is the only

question we are now called upon to decide; but a determination of it necessarily involves the question of the constitutionality of the third section of chapter 183 of the Code of 1873, which provides that in all cases where a debtor or contractor shall declare in the body of the bond, note, or other evidence of the debt or contract, that he waives as to such debt or contract the exemption from liability of the property which he may be entitled to hold as exempt under the provisions of this act, the said property, whether previously set apart or not, shall then be liable to be subjected for such debt or contract, under legal process, in like manner and to the same extent as other estate of said debtor or contractor, etc.

Now, upon the most familiar principles, every statute is presumed to be constitutional, and it is incumbent upon those "who question its validity to show wherein its invalidity consists." In the enactment before us we have a legislative construction in respect to the power of the householder to waive his homestead after it has been set apart, and unless, upon an examination of the subject we shall be satisfied that it is in conflict with some provision of the Constitution, it must be sustained.

Now, while the precise question under consideration has not been before this court, yet the matter, in various other aspects, has been the subject of judicial decision in this court and in the Circuit Court of the United States for the Eastern District of Virginia; and as the reasoning of the judges in those cases seems pertinent to this case and goes far toward establishing the validity of this enactment, we will make a few quotations from their opinions:

In re Solomon, 2 Hughes, 164, WAITE, C. J., said: "The Constitution grants the exemption as a privilege to the householder. It declares that he shall be entitled to hold property to be selected by him. No specific property is set apart, but he can select such as he desires to have, and when selected, it is to be set apart. If he fails to select, the process of the law can be executed and the sale made." * * *

The privilege, so far as it is given by the Constitution, is personal to the householder. The language is, "to be selected by him." If he neglects to act, no one is authorized by the Constitution to act in his place. The case is entirely different from what it would have been if it had been declared that certain specific property should not be sold under execution, etc.

In that case the Constitution, or a law containing similar provisions, would execute itself. As it would be a part of the public

policy of the government to exempt that particular property absolutely from forced sale, its provisions could not be waived. It would be beyond the legal power of an officer to levy upon and sell such property.

Here, says he, however, the policy is not to exempt absolutely, but the stockholder has a right to claim an exemption. Whether he will make his claim or not is optional with him. If he does not claim, he cannot have; and it is difficult to see why, if he may waive at the time of the sale by refusing to select he may not before. If he can waive at all it seems to us it follows necessarily, that for a good consideration, he may make such a contract to waive as the courts will enforce.

But it is further provided that nothing in the article of the Constitution referred to should be construed to interfere with the sale of the property or any portion of it, by virtue of any mortgage, deed of trust, pledge, or other security thereon. Thus it is made expressly to appear that it was not the intention of the framers of the Constitution to prevent the householder from contracting for the sale or incumbrance of the property. He was not required to hold it absolutely for himself and family. It was to remain entirely under his personal control, to be dealt with in such manner as he saw fit. His right to sell or incumber is as distinctly given as his right to select. Now all this was said in a case where the waiver antedated the claim of homestead, but the reasoning is general, and it seems to us to be as applicable to this case as to the one in which it was pronounced.

In *Reed v. Union Bank of Winchester*, 29 Gratt. 719, which was a case in which the waiver antedated the claim of homestead, CHRISTIAN, J., delivering the unanimous opinion of this court, and, after referring to all the provisions of the Constitution bearing upon the case, said: "It is plain that there is in none of these provisions, nor in all combined, any express prohibition of a waiver of the homestead exemption by a householder or head of a family, or any interdiction of the powers of the legislature to provide for such a waiver, or the mode in which it may be exercised. There being no express prohibition the question is, is there any restriction, by necessary implication, upon the power of the legislature to pass the act in question? I think not. I think the Constitution grants the exemption as a privilege to the householder or head of a family. It declares that 'he shall be entitled to hold' property to be selected

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by him. 'He shall be entitled to hold' plainly means that he may, if he chooses, have the right to hold such property as he may choose to select and set apart as his homestead, not exceeding in value \$2,000, etc., * * * exempt from execution, sale," etc. And he then goes on, after having alluded to the fact that the language was not in the Constitution as in the poor debtor's law, that certain property "shall be exempt" from levy, etc., which would have made the exemption absolute, to answer the objection which has been so earnestly pressed in this case, namely: that it would defeat the very object and intent of the homestead exemption if the head of the family was allowed to waive the benefit of exemption or otherwise dispose of property in which his family had the right of homestead. And he then states that in Illinois, New York, Vermont, Minnesota, Michigan, North Carolina, California, Arkansas, and Georgia, their Constitutions or statute laws provided either that the homestead "shall be exempt," or that there "shall be no waiver," or that the homestead shall be "for the sole use of the family," and so accounts for the decisions in these States which deny the householder the right to waive his exemption. 29 Gratt. 719.

And in the subsequent case of *White v. Owen*, 30 Gratt. 43, it was held by all four of the judges who were present that a deed of trust to secure a debt, executed by the grantor and his wife, conveying real and personal property which had been previously set apart by the husband as his homestead, has priority over the homestead exemption, and that the property so conveyed in trust may be subjected to satisfy the debt. In this case, ANDERSON, J., argues forcibly to show that the exemption from sale under any execution, order or other process has reference to sales by judicial procedure or under legal process, as contradistinguished from sales by the householder, as by mortgage, deed of trust, pledge, or other security created by his own act. He then in answer to the suggestion that the family have a vested right in the homestead, at least during the life of the householder, says: "I find nothing in this article which shows an intention to divest the householder and head of a family of his property, and of the unrestricted right to dispose of it as he chooses. Nothing which by express terms or by implication, divests him of his title and vests it in his wife and children, severally or jointly with himself. If, says he, it could be construed to divest him of his property and to vest

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it in others, it would operate to vest in persons, if he had no wife or children, who bore to him no such relation — to any who might constitute his family, though not even of his kindred." Such can hardly be conceived to have been the intention. It is plain that the whole purpose and intent of the article was to enable the owner of the property, if he desired for the benefit of his family, to hold so much of it exempt from execution or other legal process as did not exceed in value \$2,000. There is not a syllable or a sentence in the whole article which indicates a purpose to deprive the owner of his *jus disponendi*, or to hold it exempt from seizure and sale except under execution, order or other judicial process. Nor is there in the deed of homestead which he is authorized to make by the act of assembly, pursuant to the fifth section of this article of the Constitution. It is not an alienation of his property. It does not divest him of his title and vest it in others. It is merely designed to set apart, to designate, the portions of his property which he claims to hold, under the homestead provision of the Constitution, exempt from seizure and sale under any execution, order or other legal process, and to give notice of it to the world."

I have thus quoted at length from these opinions, not only because they show the reasons which, in the opinion of these courts and judges, influenced the framers of the Constitution in allowing the homestead exemption, but because they embody our views on the subject fully as well as we could express them. If they be sound, and we have no doubt of their correctness, it is manifest that the real intention of the framers of the Constitution was, as we have before shown, to confer upon the householder or head of a family a personal privilege, of which he might avail himself or not, as his views of the interests of himself and family might dictate; and that they, realizing that whilst it might often be expedient for the householder to set up his claim to this exemption, it might not always be for the benefit of either himself or family to retain it as a homestead, wisely so framed the provision as to prevent his being deprived of the exemption by the various processes of the law, whilst at the same time it left in the householder the absolute right of disposing of it which he enjoyed before the property was set apart. The homestead is a shield to protect the helpless and unfortunate debtor from the importunate and incompassionate creditor, not a millstone to be hanged about the debtor's neck. If all this be so, it is perfectly clear that it is utterly irreconcilable with the idea that there is any estate

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vested in the family by the mere act of the debtor in setting apart a designated portion of his property and holding it exempt from the process of the law, except in certain enumerated cases, and from the grasp of the creditor, except where the householder, for some consideration deemed by him to be valuable, voluntarily subjects it to incumbrance or sale. Nor can I perceive in this *jus disponendi* of the householder any thing which militates against the idea that it is held for the family as well as for the householder, for the effect of the provision is to allow the householder to select and set apart and hold as a homestead certain property so long as, in his discretion, it may be for the benefit of himself and family, and when, in his opinion, it is more for their benefit to do so, to dispose of it. A provision permitting a householder to hold as exempt certain property so long as it may be for the benefit of himself and family is perfectly consistent with one which permits him to retain the right to make sale of the same property when it shall be for the benefit of the family for him to do so; and as the householder, being the head of the family, is of necessity more especially charged with the support and maintenance of its members, it would seem to be peculiarly proper that the power to charge, incumber or make sale of the property should be lodged in him.

It has been argued that as the words "for the sole use of the family" have been construed, in other States, to create vested rights in the family, so the words "for the benefit of himself and family" should receive a like construction. But the ready answer to this suggestion is that the use of words like these, "there shall be no waiver," or "for the sole use of the family," exclude the idea that the husband or father has the absolute right of property in the homestead, and shows that it is a part of the public policy of the government to exempt that particular property absolutely from forced sale, and its provisions could not therefore be waived; but in the other case, as we have shown, no such implication can arise.

We find no error in the decree of the Circuit Court of Botetourt county, and the same must be affirmed.

Decree affirmed.

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SHEELER'S ADMINISTRATOR v. CHESAPEAKE AND OHIO RAILROAD COMPANY.

(31 Va. 282.)

Master and servant — narrow railway bridge — contributory negligence.

On the defendant's railway was a bridge with sides five feet high, coming up one foot above the floor of the engine-cab, and thirteen and a half inches from the sides of passing engines. The plaintiff's intestate, a fireman, well knowing the character and situation of the bridge, without orders and in violation of the rules, opened the ash-pan, whereby fire was communicated to woolen waste in a journal box. Then without orders or necessity, he stood outside of the engine on the steps of the engine and tender, and endeavored to extinguish the fire with a hose, and while so employed he was struck by the side of the bridge and killed. *Held*, that the company was not liable.

ACTION for death of plaintiff's intestate by negligence. The plaintiff had judgment below. The opinion states the facts.

Tucker & Tucker, for plaintiff in error.

Robertson, Parrish, and Wickham, for defendant in error.

RICHARDSON, J. The declaration contains but one count, the gravamen of which is, that the deceased, a fireman in the employment of the defendant company, lost his life while in the discharge of his duty as such fireman, by reason of the defendant's negligent and careless construction, at a point in the line of its road, of a bridge, the upright sides of which were not sufficiently distant from the engines and cars when passing over same to allow and permit the plaintiff's intestate, as such fireman, to properly discharge his duties as fireman without incurring unreasonable risk and danger to his life and limbs.

The defendant demurred to the plaintiff's declaration, and the court overruled the demurrer. Thereupon the defendant pleaded not guilty, upon which plea issue was joined.

At the trial in the court below, when all the evidence on both sides had been heard by the jury, the defendant demurred to the plaintiff's evidence, and the plaintiff joined therein. The jury found a verdict in favor of the plaintiff, and assessed the damages at \$2,500, subject to the opinion and judgment of the court on the

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demurrer to evidence. On consideration, the court gave judgment for the defendant on the demurrer; and on the application of the plaintiff a writ of error to said judgment was awarded by one of the judges of this court.

The unfortunate occurrence, which resulted in the death of Thomas A. Sheeler, happened on the night of the 27th day of November, 1883, at a point on the defendant's line of railway, between Copeland's and Crane's stations. The deceased (Sheeler) had been in the employment of the defendant for over three years — first as brakeman, and then, for the last eight months of that period, next preceding and at the time of his death, as fireman. Prior to the occurrence which resulted in his death, Sheeler had been regarded as a good and reliable railroad man, and had been recommended for, and been promised, promotion to the position of engineer.

It does not distinctly appear in evidence whether the train, on the engine of which Sheeler was fireman, was a passenger or a freight train; but from what is disclosed, the fair, if not necessary, inference is that it was the latter. On that train R. J. Sweetwood was the engineer, having charge of the engine which drew the train, Sheeler, the fireman on said engine, and W. C. Miller, front brakeman; the latter being the only person who saw and knew exactly how Sheeler met his death, and the circumstances leading thereto. On the night in question this train left Clifton Forge — one witness says, about twelve o'clock, and another says about 11:50 o'clock, under a special time order on No. 3 (the express train), and having until 12:40 to reach Mason's tunnel, some fifteen miles distant, where it was to stop for said express train to pass, going west — Miller, the front brakeman on the train, at or about Copeland, came forward and seated himself on the fireman's box in the cab, on the left side of the boiler, near to and in full view of Sheeler, the fireman. Sweetwood, the engineer, was at his position, forward, on the right side of the boiler. The engine was what is known as a combination engine, with boiler five feet in diameter, extending back through the cab, so that Sweetwood, from his position, could not see Sheeler in the position in which the latter was at the time of the accident, he being on the steps of the engine and tender on the left side thereof. From Miller's testimony it appears, that as the train was passing, or as it left Copeland's, Sheeler shook his grate vigorously for two or three minutes, and soon there-

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after discovered that some waste woolen ravellings, saturated with grease, on top of the box of the rear driving wheel of the engine, were on fire and blazing; seeing the fire, Sheeler took a small hose attached to spigot on tender, got down on outside of engine and tender, with his right foot on the step of the engine and his left on step of tender; and clasping with his right hand the hand-holder on engine, and holding in his left hand the hose, swung his body out and forward in a stooping posture, and with his left arm reaching round under the side of the engine, was attempting to extinguish the fire, when he struck against the upright side of the bridge, was knocked down and killed; the train at the time running at the rate of eighteen or twenty miles an hour.

Sheeler got in the position in which he was killed within about three hundred yards of the bridge. Miller, who was looking at him, and not thinking they were so near the bridge, happened to look forward, and by the aid of the head-light saw the bridge, but just had time to turn when he saw Sheeler fall, struck by the bridge. Miller called to Sweetwood across the boiler; the train was stopped as quick as possible, and the two went back, assisted in taking up Sheeler and putting him in the caboose of the train, and by reason of the time thus lost and the danger of a collision with the coming express train, had to hurry away so as to get on the siding at Crane's, for the express to pass. Crane's is three or four miles west of Mason's tunnel, and by that distance short of the point to which the train had been ordered to go by the time order. From the bridge to Crane's, where the train stopped for the express to pass, there seems to have been no fireman. On arriving at the latter place it was discovered that the ash-pan of the engine was open. To open the ash-pan when a train is in motion was in violation of the company's orders. Miller says: "The accident happened from Sheeler getting down on the steps to put the fire out. A fireman could not run by there four or five months without knowing about the bridge." The same witness says: "When Sheeler shook the grate bars as the engine was running along, the live coals fell out and bounded against the ties up to the driving-wheel spokes, and they threw them up against the waste on the driving box. That's how it was set on fire."

From the statement of Sweetwood, the engineer, under whom Sheeler was fireman, it appears that he knew nothing of how the accident occurred, as from his position as engineer he could not

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see Sheeler in the position in which he was when struck; that a man standing on the engine steps could not, in his opinion, safely pass the bridge, though he never saw a man try it, and would not try it himself; that the top of the bridge side is about eighteen inches higher than the floor of the cab, and that he supposed the distance or space between side of passing engine and side of bridge to be about nine or ten inches, but that he never examined the bridge; that he did not, and would not, have ordered Sheeler into the position in which he was, and that his duty as fireman never required him to get on outside of engine or tender when in motion, and that Sheeler took the position in which he was killed voluntarily and at his own risk, and that Sheeler could not have put out the fire in the way he was trying, as the rapidly revolving wheel would prevent the water from passing through the spokes to the fire; that if he (the engineer) had discovered the fire, it would have been his duty to put it out as quick as possible, but that it would have been necessary to stop the train to do so, and that as the waste on fire was a very small quantity, and burned slowly, and there being nothing at that point which the fire could harm, he would have waited until he reached his next stopping place (Mason's tunnel), before attempting to put the fire out.

The same witness testifies that the train was running up grade at the time of the accident; that on such grade the fireman's duty is to stand down in the center of the front of the tender, and shovel coal into the furnace at short intervals, in which position he is kept pretty busy; but on a level or down grade the fireman may get up in the cab and sit on the fireman's box, and look out for the next up grade; that a fireman may shake the bars of his grate when he pleases, but must keep the ash-pan closed when the engine is in motion, and that he (Sheeler) knew this, because he (Sweetwood) had told him when he commenced as fireman; and that the ash-pan would not have been open if Sheeler had discharged his duty, and that the ash-pan could not have been open without Sheeler knowing it, as the handle to it is a heavy iron bar which lifts up from the floor and stands in the face of the fireman when the pan is open, but when the pan is shut the handle is down to the floor. Sweetwood, the engineer, also explains the difference between the ash-pan damper and the ash-pan slides, and shows that the former, in one class of engines, is at the bottom of the side of the ash-pan, and in another class is at the

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top of the side of the ash-pan, while the slides are in the bottom of the ash-pan, in moving which, by lifting up the handle, the contents of the pan are permitted to escape. He also testifies that besides the duties of a fireman when the engine is running, it is his duty to rub and help to keep the engine clean when it is standing; and he says that firemen are sometimes apt to open the ash-pan when the engine is running, and thereby enable the contents to escape, and thus save themselves disagreeable work when the engine stops. The witness, Sweetwood, also describes that part of the road where this accident occurred as notoriously the most dangerous between Charlottesville and Clifton Forge, on account of the numerous bridges and tunnels, there being, in that part of the road, over Pad's creek, and within the distance of two miles, three bridges — it being at the middle bridge that Sheeler was killed; and he testifies that Sheeler, as fireman and brakeman, had passed this bridge on an average once a day for over three years, and as often in the day-time as at night.

Omitting more minor details of statement, such are the facts of the case brought out by the witness introduced by the plaintiff, except certain printed rules of the company referred to in the testimony, which will be noticed further on.

The defendant introduced only one witness, E. L. Crenshaw, civil engineer by profession, and for six years, next preceding the death of Sheeler, had been in the employment of the defendant as assistant division engineer between Richmond and Huntington, the bridge in question being in his charge. This witness, speaking from actual knowledge, describes the bridge; and his statement is uncontradicted by any thing in the evidence for the plaintiff, or any inference that can be fairly drawn therefrom. The substance of his statement is: That the bridge is a half through bridge, with sides just five feet high — that is, to comb of roof — a through bridge being a covered bridge; that the space between passing engines and sides of bridge is just thirteen and a half inches, and that the top of sides is just one foot higher than floor of cab; that there is less danger to a trainman of being struck by such a bridge than by a through bridge, and that it is not safe to be on the outside of the engine in passing such a structure; that in Sheeler's position, as described by the witness Miller, he could not have passed any through or half through bridge, or single track tunnel on that line of railway; that Coleman's tunnel, through which Sheeler had just

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passed, is just eleven feet eight inches in width, and that there are five other bridges on the road (known to witness) just like the bridge in question; that the bridge was an old bridge, had been known to witness for six years, and in that time had not been materially altered; that besides bridges and tunnels, there are projecting structures on all roads just as close to the track as the bridge in question, and closer, that would strike a man in the position in which Sheeler was; and that if the bridge, where Sheeler was killed, had been one foot or eighteen inches wider even, he would have been killed. And the witness says: "The bridge is properly built."

Looking to the pleadings, the facts and the principles of law applicable to the case, we fail to perceive any ground upon which the plaintiff below, the plaintiff in error here, could be entitled to prevail.

As we have seen, the plaintiff's claim to damages is predicated solely of the alleged negligence of the defendant in error in carelessly and negligently constructing a certain bridge, and the upright sides thereof, in the line of its road, so close to the track that the plaintiff's intestate, a fireman in the employment of said company, while in the due discharge of his duty and while exercising due care and caution as such fireman, was hurled and thrown against the side of said bridge, and was killed by means thereof.

Discussing the degree of care which the law exacts of a master, it is said in 2 Thompson on Negligence, at page 985: "It is the duty of railroad companies to keep their works and all portions of their track in such repair, and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others. They are bound to furnish a safe road and sufficient and safe machinery and cars. The legal implication is, that they will have and keep a safe track, and adopt suitable instruments and means with which to carry on their business. They can provide all this by the use of the requisite care or foresight; and if they fail to do so, they are guilty of a breach of duty, and are liable for the consequences. Of course, this obligation does not extend so far as to require them to provide against dangers which could not be reasonably foreseen; nor are they bound to secure the track against injuries which could not be anticipated by reasonable means, such as an unprecedented flood, or other unusual visitation. If a railway bridge is without fault as to plan, mode of construction

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and character of materials, so that it was originally sufficient for all the purposes for which it was designed, and if the company sees that it is afterward inspected, at intervals sufficiently short, by competent and skilled men, who exercise ordinary care and diligence to keep it in repair, the company has discharged its duty, and is not liable to an employee for an injury caused by a defect in such structure, unless it is shown that the company had notice of such defect, and after such notice failed to repair it."

Tested by the principles comprehensively and justly stated by the author quoted above, how can it be said that the railroad company, in this case, was derelict or negligent in the performance of any duty imposed upon it by law? Aside from the averments in the declaration, the record does not disclose a single circumstance or fact from which to draw the conclusion that the bridge in question was in any respect defective in its mode of construction, or that the deceased, in the proper discharge of his duty as a fireman in the employment of said company, was subjected to any unreasonable risk and danger to his life or limbs; or that in the proper discharge of his duty, he was, by reason of the manner in which the bridge was constructed, subjected to any risk whatever other than what might and did result from his own want of proper care and caution, indeed from his own reckless exposure of his person in a position of imminent peril, and where his duty did not call him.

So far from there being any evidence that the bridge was defective in its mode of construction, the direct, positive, and uncontradicted testimony of the assistant division engineer, E. L. Crenshaw, is that the bridge is of the same width of all other bridges of a similar character along that line of railway, and is wider than some similar structures, and equal in width with others on other railroads in this State, mentioned by him. And his direct and positive statement is: "That the bridge is properly built." This evidence is not in conflict with any evidence offered by the plaintiff, nor with any inference to be fairly drawn therefrom, and is therefore entitled to its full weight, even under the rule governing demurrers to evidence.

In view of the facts, as disclosed by the record, it is not possible, consistently with the very truth of the case, to arrive at the conclusion that the defendant in error is legally liable to answer in damages for the death of Thomas A. Sheeler, or that the defendant company did not, to the fullest extent, exercise the requisite care

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and foresight demanded by the legal implication that it would keep a safe track, and adopt suitable instruments and means with which to carry on its operations with safety to all who might lawfully be on its road, in the exercise of ordinary care and caution, whether passengers or employees. The bridge was without fault as to plan and mode of construction; was amply sufficient for, and had for many years answered all the purposes for which it was constructed. In such case this court cannot undertake, in the absence of evidence, to say that the bridge was too narrow or was in any respect defective or unsuited to a well-constructed railway, or dangerous to either passengers or employees in the exercise of ordinary care and caution. To hold a railroad company liable, under such circumstances, on the ground of defective construction, would be to go far beyond the limits of judicial authority, and impose liability not imposed by law. There can be no presumption of negligence in a case like this.

In *N. and W. R. Co. v. Ferguson*, 79 Va. 248, FAUNTLEROY, J., says: "A carrier is not liable for injuries resulting from accident against which the highest degree of skill, foresight and diligence would have been unavailing. The presumption of negligence however does not attach itself to every injury which may overtake a passenger while being transported in a car; it belongs only to that class of accidents which are caused by a defect in the road, cars or machinery, or by want of diligence or care in those employed, or by some other thing which the company can and ought to control as a part of its duty to carry the passenger safely, because in all these matters it is the duty of the company to use the highest degree of care to have all their arrangements safe and in good condition." See also 20 Am. Ry. Rep. 245-247, 261; *Meir v. Penn. R. Co.*, 64 Penn. St. 226, and other authorities cited by FAUNTLEROY, J.

The settled doctrine is, that "in order to maintain an action against a railroad company for injuries received, etc., it must be proved that the injury was caused by the negligence of the defendant, or his agents, and it must not appear from the evidence that want of ordinary care and prudence on the part of the person injured directly contributed to the injury." 17 Am. Rail. Rep. 253, and cases cited; and also FAUNTLEROY, J., in *Railroad v. Ferguson*, *supra*. So, "when negligence is the gravamen of the action, and no negligence is found on the part of the railroad company, or

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by any of its agents or employees, the law does not impute it; it lies on the party alleging it to prove it." *Richmond and Danville R. Co. v. Anderson*, 31 Gratt. 812; s. c., 31 Am. Rep. 750; *N. and W. R. Co. v. Ferguson*, *supra*. In the application of these principles to the evidence, even as furnished by the plaintiff's own witnesses, it is clear beyond dispute that there is an utter absence of any evidence that the bridge, against which the plaintiff's intestate struck and was killed, was in any respect negligently or improperly constructed. So far from it, as we have seen, the direct and positive proof is that the bridge was properly built.

The case presented by the evidence is not only one in which the deceased did not observe the requisite care and caution, but is one in which he so recklessly exposed himself, in a position of extreme peril, as to make it absolutely certain that his own rash and thoughtless act was the sole proximate cause of his death. He was in a position where his duty did not call him, and into which he had not been ordered by any one in authority. He was on the outside of the engine and tender, with his feet resting, one on the step of the engine, the other on the step of the tender, clasping with his right hand the hand-holder on the engine, and in his left hand the small hose, and with his body swung out and stooping forward, with his left arm reaching round under the side of the engine, was engaged in the futile attempt to put out some burning waste on the box of the rear driving wheel of the engine, by squirting water from the hose through the spokes of the rapidly revolving wheel; the train at the time running at the rate of eighteen or twenty miles an hour. In this position he struck against the bridge side and was killed. The evidence is clear and explicit, not only that the bridge was properly constructed, but that had the bridge been twelve or even eighteen inches wider, the result would have been the same; and that in his position, Sheeler could not have safely passed any similar structure or single-track tunnel on that line of railway. Moreover, Sheeler took upon himself this desperate risk, after having passed this bridge, as brakeman and fireman, for over three years, and on an average, once a day during that long period. Hence, it is said: "If the servant, before he enters the service, knows or if he afterward discovers, or if by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow servant in connec-

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tion with which or with whom he is to labor is unsafe or unfit in any particular; and if notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master, in case it shall result in injury to him." 2 Thomp. Neg. 1008. And at page 1509 the same author, with obvious propriety says: "It may be stated, as a general proposition, that the master is under no higher duty to provide for the safety of the servant than the servant is to provide for his own safety.

Thus Sheeler had the most ample opportunity of knowing, and the necessary inference is, that he knew all about the danger to which he voluntarily exposed himself, and which resulted so fatally to him. The evidence shows that his place, when the train was in motion, was inside the engine and tender; that no duty, under such circumstances, called him on the outside, but that he went on the outside, where to a rational being, in the exercise of ordinary foresight, no other result than that which followed could have been reasonably anticipated. Why did he thus rashly and thoughtlessly act? We think the facts and circumstances brought out in evidence sufficiently explain it. Sweetwood, the engineer, had sought and obtained the promise of promotion for Sheeler, and in this matter the latter most naturally felt a deep interest. He had however as we are bound to infer from the evidence, left his ash-pan open, and the live coals escaping had set on fire the waste on the box of the driving wheel. Conscious that the fire thus communicated was the result of his own carelessness and disobedience of orders, he hastily and without due reflection undertook the impossible thing of putting out the fire while the train was in motion, and thus to remove the evidence of his own careless neglect of duty in failing to keep his ash-pan closed, before it should be discovered. Thus impelled, he thoughtlessly put himself in the position of danger which resulted in his death. It cannot therefore be said that the accident resulted from the careless and negligent mode of constructing the bridge. The evidence establishes quite the contrary. We need pursue this branch of the case no further. Indeed, in respect to the mode of construction of the bridge in question, every demand upon the defendant in error here is met, and more than met, by the decision of this court in the case of *Clark's*

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Adm'r v. R. and D. R. Co., 78 Va. 709; s. c., 49 Am. Rep. 394. In that case the plaintiff's intestate, a brakeman on a freight train, whose duty required him to be on the top of the train while in motion, was struck by an overhead bridge, while at his post of duty, and killed. The bridge, like many others along that line of railway, was constructed so low that it was impossible for a man of ordinary stature to stand on the top of the train and pass safely under the bridge. The deceased had been but a short time in the employment of the company as brakeman, though he had previously been for some time employed in the company's yard at Manchester, shifting cars, making up trains, and the like; and at the time of entering into the company's service as brakeman, he was warned by the company's agent to look out for the overhead bridges, and his fellow brakemen were instructed to show him the bridges, and to warn him of the dangers attending the same. He had passed the bridge at which he lost his life only three times, and each time in daylight; on the fourth trip at night he was killed, he having been warned at the last stopping before reaching the bridge to look out for same; and when nearing the bridge (standing) was called to by his fellow brakeman, but he did not hear, or if he did failed to take the warning, and was struck and killed. It was insisted in that case that the defendant in error, the railroad company, was guilty of culpable negligence in so constructing the bridge that the plaintiff's intestate, in the discharge of his duty, could not safely pass under the bridge standing erect, and that the company had not duly notified him of the danger.

All the authorities were carefully reviewed by LACY, J., who delivered the opinion in that case. In the course of his opinion that judge, quoting with approbation from the opinion of the court in *Owen v. N. Y. Cent. R. Co.*, said: "In view of the brakeman's knowledge as to the bridge, his omission to avoid the accident by stooping was such want of ordinary care and caution as would defeat his action if otherwise maintainable. Having assumed the risk of injury to person from the bridge, evidence offered by him upon the trial tending to show its dangerous character was properly excluded. The danger was open and obvious, and within the plaintiff's personal knowledge at the time he entered the defendant's employment. It was a danger clearly incident to the service which he undertook to perform. He knew as well as his employer the perils of the business, at least as respects the bridge in question, and the

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law will imply that he assumed the risk of personal injury;" citing *Sherman v. Rochester and Syracuse R. Co.*, 17 N. Y. 173; *Faulkner v. Erie R. Co.*, 49 Barb. 324; 39 N. Y. 468.

Such being the doctrines applied to the case of a brakeman, whose duty required him to be on top of a freight train and frequently to pass in an erect position, from one freight car to another, on a line of road where many overhead bridges were constructed too low to permit a man to pass safely under such structures without stooping or sitting down, and the brakeman, though the bridges had been pointed out to him, and he warned of the danger, had only passed the bridge three times, in daylight, and was killed by coming in collision therewith on his fourth trip, at night, and where his contributory negligence consisted only in omitting to stoop or sit down, surely there can be no necessity for argument to show that there is no just ground to hold the railroad company liable in this case, when it clearly appears that the deceased when killed, was voluntarily in a position where his duty did not call him when the train was in motion—the extreme peril of which position he was bound to know, as a rational being, with long experience and actual knowledge of the situation, and when, but for his own reckless act, he would not have been killed. There is therefore no just reason for saying that Sheeler met his death by reason of the company's negligent and defective mode of constructing the bridge.

[Omitting minor points.]

The law holds such companies to a rigid accountability for the loss of life, or for injury to the persons of all who may lawfully be on their roads, when such loss or injury is the result of the negligence and carelessness of the company or its agents. But when the death or injury to person results solely, as in this case, from the want of due care and caution on the part of the person killed or injured, there can be no recovery. In any view of the case, we are of opinion that the death of the plaintiff's intestate was the result of his exposure of his person to a danger not even incident to his service, for which the company was in nowise responsible; and that the judgment of the court below is plainly right, and must be affirmed.

Judgment affirmed.

HARRIS V. COMMONWEALTH.

(81 Va. 240.)

Statute—"public performances and exhibitions"—skating-rink.

A skating-rink is not within a statute requiring a license to be taken out for "public performances or exhibitions."*

CONVICTION of violation of revenue law. The opinion states the case.

Sands & Bryan, for plaintiff in error.

F. S. Blair, attorney-general, for Commonwealth.

LEWIS, P. This is a writ of error to a judgment of the Hustings Court of the city of Richmond. The indictment on which the accused was convicted, charged that he "unlawfully did keep and maintain a certain public performance, called a skating-rink, for compensation, the same not being for benevolent or charitable purposes," etc.

The indictment is founded on the act entitled "An act to provide for the assessment of taxes on persons," etc., approved March 15, 1884, the material portions of which to the present case are as follows:

"80. No person shall, without a license authorized by law, exhibit for compensation any theatrical performance, or any performance similar thereto, panorama, or any public performance or exhibition of any kind, lectures, literary readings and performances, except for benevolent or charitable purposes. * * * * For any violation of this section, every person so offending, shall pay a fine of not less than fifty dollars nor more than five hundred dollars for each offense."

"81. On every theatrical performance, or any performance similar thereto, panorama, or any public performance or exhibition of any kind, except for benevolent or charitable purposes," there "shall be paid three dollars for each performance," etc. Acts 1883-1884, p. 593 *et seq.*

The evidence at the trial was not conflicting, and as certified, is substantially as follows: That the accused was the conductor of a

* See *Bowlin v. Lyon* (67 Iowa, 536), 56 Am. Rep. 355.

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skating-rink in this city, which ordinarily was visited by persons for the purpose of skating; that he obtained no license for the privilege, save on occasions of public performances by professional skaters, when he paid the specific license tax required by law of three dollars per night; that on ordinary occasions the prices charged for admission were ten cents for each person, and ten cents additional if the person used skates kept at the rink for hire; that many persons attended and paid for admission to the rink who did not skate, but attended rather as spectators; and that those who attended the rink did so, not for the purpose of giving a performance or exhibition, but for the purpose of individual enjoyment.

Upon these facts the accused was convicted and sentenced to pay a fine of fifty dollars and the costs of the prosecution.

In the petition to this court various errors are assigned, of which the first is that the Hustings Court erred in refusing to give to the jury the following instruction: "That if they believe from the evidence that the defendant took out a license as prescribed by law whenever an exhibition or performance of professional skating was given, they should find the defendant not guilty."

By this instruction the court was asked in effect to tell the jury that if the proper license tax was paid when performances of professional skating were given they must acquit the accused, notwithstanding they might believe from the evidence that he gave for compensation, and without a license, other public performances, not of professional skating, which is clearly not in accordance with law, and the instruction was therefore properly refused.

The remaining questions may be considered in connection with the motion to set aside the verdict as being contrary to the law and the evidence. This motion the Hustings Court overruled, and in so doing we think there was error.

The rule is universal, except in particular instances where changed by statute, that penal statutes are to be construed strictly, and are never to be extended by implication. And this rule applies with full force to a case like the present; for while the statute on which the prosecution is founded is a revenue law, yet in so far as it imposes penalties for a violation of its provisions, it is a penal statute, and must be construed accordingly.

No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and letter of the statute imposing

such penalty. "If these rules are violated," said BEST, C. J., in the case of *Fletcher v. Lord Sandes*, 3 Bing. 580, "the fate of accused persons is decided by the arbitrary discretion of the judges, and not by the express authority of the law." Pott. Dwarr. 245 *et seq.*

In *United States v. Wiltberger*, 5 Wheat. 76, Chief Justice MARSHALL, speaking for the Supreme Court of the United States, said: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. * * * It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

Now, it will be observed, that skating-rinks are not enumerated in the statute, and consequently cannot be brought within it, unless it is clearly shown that they are so conducted as to be properly "public performances or exhibitions." And this is to be determined by the jury on the particular facts of each case, under suitable instructions from the court as to the law. But here the evidence shows that no performance of any kind was offered to the public except on extraordinary occasions, when exhibitions of professional skating were given, and then the license tax was paid as required by law. On ordinary occasions admission fees were charged merely for the privilege of skating, and for this no license tax is imposed. And if of those persons who paid for this privilege, some preferred, after entering the hall, to witness rather than participate in the skating, a liability cannot, for that reason, be imposed on the accused to which he would not have been subject had all chosen to exercise the privilege for which they had paid. In other words, it is clear that the liability of the accused to prosecution for not taking out a license, cannot be made to depend upon the course pursued by the patrons of the rink after their admission thereto.

Moreover, if it can be justly said that on ordinary occasions there was any public performance, because of the fact that some of those

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who visited the rink were mere spectators of the exercises, it certainly cannot be said that such performance was exhibited by the accused. For those whose movements were witnessed by the spectators were not agents or employees of the accused, or in any way subject to his control, but were persons who resorted thither for their own pleasure or amusement, and not for the purpose of exhibiting themselves or their skill to others. In short, we are of opinion that, according to the strict construction which must be given to the statute, the present case is not within its provisions.

If, in the judgment of the legislature, a license tax ought to be paid, under all circumstances, for the privilege of conducting a skating-rink for compensation, it is competent for that body, by altering the statute, to so provide. We can only construe it as it is.

Judgment reversed.

LACY and FAUNTLEROY, JJ., dissented.

BALDWIN V. BALDWIN'S EXECUTOR, ETC.

(51 Va. 406.)

Wills — execution — presence — request to witnesses.

The testatrix's friend, S., said to her: "These gentlemen, F. and R., have come to witness the will." She bowed her head. The will was read to her by F. in an audible voice; and on being asked if she understood it, she bowed again. She then signed the will. The witnesses, F. and R., subscribed the will at a table in the room near the foot of the bed. She was so lying that she was obliged to see them, unless she shut her eyes or turned her head away. *Held*, a valid execution.*

BILL to set aside will. The opinion states the case. The will was sustained below.

B. T. Crump, for appellant.

Cannon & Courtney and *J. G. Blackwell*, for appellees.

LACY, J. In September, 1884, David J. Baldwin filed his bill to impeach the will of his deceased sister, Mary F. Baldwin, which had been admitted to probate April 3, 1883, upon the ground that it was

* See *Riggs v. Riggs* (185 Mass. 238), 46 Am. Rep. 484; *Meurer's Will* (44 Wis. 498), 28 Am. Rep. 591.

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not executed in the mode required by law; that the testatrix was not of sound mind when the will was executed, owing to the effect of disease; and that her mind being weakened and her body enfeebled by her sickness, she had been the victim of undue influence, selfishly exercised over her by her sister-in-law and the executor named in the will, who were, together with their friends, the only companions of her last days; that the testatrix had committed the injustice of overlooking altogether her own relations, and had bestowed her whole estate (real and personal) upon her brother's widow.

The chief beneficiary was Virginia V. Baldwin, the widow of C. J. Baldwin, deceased, who answered the bill, as did also Franklin Stearns, the executor. They denied any undue influence of any sort, and all injustice alleged in the bill, as to the provisions of the will, and alleged that C. J. Baldwin, deceased, the late husband of the respondent, Virginia V. Baldwin, was the oldest brother of the testatrix; that upon the death of their parents the said C. J. Baldwin had taken his sister to live with him and his wife, Virginia M. Baldwin, and provided for all her wants until his death, and at his death had devised his home, situated in Richmond city, and which had been so long their home together, to his wife and this sister in equal interest, and had bequeathed to them — share and share alike — the money belonging to him in the hands of Franklin Stearns, the said Stearns being appointed his executor, to act as such without giving security; that this property thus left her by her deceased brother was by the said sister given by her will to this brother's widow, who survived her; that the interest testatrix had in the estate of another deceased brother, together with whatever else she might have, other than such as she derived from the late husband of Virginia V. Baldwin, she had given to her surviving brothers, confining her benefactions as to Virginia V. Baldwin to the property derived from her husband, and giving her own relatives every thing else she possessed; that to the making of such a just and altogether natural will no undue influence was necessary, and none was used; that no suggestion was ever made to the testatrix as to how her property should be disposed of; and that her will had been prepared for her only at her own request, often repeated, and in accordance with clearly expressed wishes.

An issue was made up in the said court as to the validity of the said will, and a jury impaneled to try the same. The evidence being heard, both sides waived a jury, and by consent the jury was

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discharged from further consideration of the cause, and the whole case submitted to the judge, who rendered a decree sustaining the validity of the will.

The defendant moved for a new trial, and the said motion being overruled, upon the motion of the said defendant the evidence in the cause was certified, which consists exclusively of the evidence of the plaintiff, none being offered by the defendant. Thereupon the defendant applied to this court for an appeal; which was allowed.

There being no evidence in the cause whatever which tends to sustain the charge of undue influence, there being no hint to be found anywhere throughout the evidence to give any countenance whatever to such a charge, it is unnecessary to say more on that point than that it is not sustained.

As to the sanity and capacity of the testatrix when the will was executed, there can be no serious question. The evidence shows that the testatrix was sick and weak, but when the will was to be witnessed, the executor named therein and two witnesses of the highest character and of superior intelligence, gathered together around the bedside of the sick woman, with her nurse, and when the will was read to her, she was asked if she understood and approved it, and she bowed her head, giving such assent as satisfied these gentlemen. Writing her name in a recumbent posture, in a somewhat illegible manner, she was told by the witnesses that she had better sign again, and she was raised up in bed, and a pen given her, when she again subscribed her name in a perfectly legible manner, the will being laid before her on a book. All the witnesses to the ceremony concur in the assertion that she was perfectly conscious of all that she was doing, and that no contrary suspicion entered their minds either then, nor has it since. It cannot be doubted that she was possessed at the time of a conscious and capable mind.

As to the execution of the will, the evidence is, that upon entering her room on the day of the execution of her will, Mr. Stearns said to the testatrix that these gentlemen had come to witness the will, and she bowed her head in assent. The will was then read to her by one of the witnesses, Rev. Francis M. Burch, in a clear and audible voice, and upon being asked if she understood it, she signified her assent as before. She then signed the will in a legible manner, her arm being held to steady it, but the pen not touched.

The testatrix was then laid back in a recumbent posture as before, and the witnesses subscribed the will at a table in the little room near the foot of the bed, in the presence of the testatrix, both being present together. That she saw them cannot be doubted; she was lying with her head inclined toward the witnesses, and the foot-board to the bed was very low. And the evidence is that the testatrix could not have done otherwise than see the witnesses when they subscribed the will; the room was only twelve feet square. The witnesses say that they were not looking at the testatrix when in the act of subscribing the will as witnesses, but that unless she shut her eyes, or turned her head away, she was obliged to see them.

There is no evidence that the testatrix requested the witnesses to subscribe the will as such, but Mr. Stearns said when he came in the room, that these gentlemen had come to witness the will, and the testatrix bowed her head in assent. She did not speak, but it is proved that she could speak, and did speak that day in a low, but audible voice — low on account of weakness — to the executor, Mr. Franklin Stearns, on the morning of the day, about ten o'clock, and Mr. Stearns says that her mind was bright and clear. If, then, she understood Mr. Stearns to say that these gentlemen had come to witness the will, and assented, and then saw them subscribe the will as witnesses, was any other request necessary?

Rev. Mr. Burch says that Mr. R. L. Brown, a subscribing witness, asked the testatrix, after the will was read by Mr. Burch, whether she understood that she was giving all her property to Mrs. Jennie Baldwin, and she bowed in assent. Mr. Brown does not remember asking this question, but thinks he did not say that, but has an indistinct impression that he said something to her, perhaps, "Miss Fanny, do you know this is your will?" Mr. Brown says that Miss Fanny could not have seen the will when it was subscribed by the witness, but she could see the table on which it was lying, and the persons of the subscribing witnesses who were between her and the will; and that he thought the testatrix understood perfectly well that she was making her will and disposing of her property, and he had known her all his life.

What is "in presence of the testator" has been often the subject of judicial investigation and construction. Actual presence is being bodily in the precise spot indicated. Constructive presence is being so near to, or in such relation with the parties actually in

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a designated place as to be considered in law as being in the place. He who is incapable of giving his consent to an act is not to be considered present, although he be actually in the place. It would seem that a lunatic, or a person sleeping when the act was done, could not be considered present.

Under the English statute of frauds, it has been said that an actual presence is not indispensable, but that when there was a constructive presence it was sufficient; as when the testatrix executed the will in her carriage standing before the office of her solicitor—the witness retired into the office to attest it—and it being proved that the carriage was accidentally put back, so that she was in a position to see the witness sign the will through the window of the office. *Casson v. Dade*, 1 Brown C. C. 98.

Judge CARR said, in *Neil v. Neil*, 1 Leigh, 11: “Signing in the presence of the testator was to enable him to see that the persons he confided in were those who attested, and to prevent a false paper being imposed upon them. The phrase employed is one in common use—in presence of the testator. What is presence? The opposite of absence. It may be said of every attestation that it was either in the presence, or in the absence, of the testator. Presence seems to mean, in company with; within the view of; in the same room with. Thus, if you ask a man, ‘Were you present when such a thing happened?’ He will answer, ‘Yes, I was in the same room.’ If a man be in one room, and the transaction take place in another room of the house, it would certainly, *prima facie*, be considered out of his presence. In all the cases therefore when an attestation out of the room of the testator has been supported, the court has extended the construction to take in the cases within the meaning, though not the strict words of the statute. This the courts are always inclined to do; and on no subject have they gone farther than in support of the last wills of the dead when the objection is technical, and the meaning of the statute has been substantially complied with. Thus, in *Right v. Price*, 1 Doug. 243, Lord MANSFIELD says: ‘The court would lean in support of a fair will, and not defeat it for a slip in form when the meaning had been complied with.’” Judge GREEN, in the same case (*Neil v. Neil*) said: “Courts of justice have always, and very properly, leaned strongly in favor of the validity of wills fairly made, and when there is no imputation of fraud. * * * Where the testator and the witnesses are together for the purpose of attesting a will, and so their

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attention specially called to that object; if they be in such a situation that the testator may, if he pleases, by the exertion of his own volition and physical powers, without materially changing his position with reference to place, and without the assistance of others, see the witnesses subscribe, that is a subscribing in his presence. And perhaps the cases justify us in saying that this is under such circumstances, a presumption or conclusion of law against which no evidence will be received." Judge COALTER said, in that case, speaking of the witnesses: "And therefore the most that they can be required to prove is that he (the testator) was so present to them, and they to him, as that he might, and therefore probably did, see the attestation." Judge CABELL said on this subject: "An attestation therefore out of the room of the testator, but proved to be within the scope of his vision, becomes good as being in his presence; and an attestation in the same room, but proved to be out of the scope of his vision, becomes bad as not being in his presence. And this is, as I take it, the substance of all the authorities." Judge BROOKS said: "It is admitted that it need not be proved that the testator actually saw the attestation of the will, if he had the power to see it; and that he may dispense with this portion of his controlling influence, and turn his back upon the witnesses when they attest the will. * * * The statute might have required that the testator should actually see the witnesses subscribe the will, but this would have rendered it impossible for a blind man to make a will." This case was considered and decided by a full bench, and all the judges wrote opinions; and while they differed in the result of the case (a majority being of opinion to reverse the case, and reject the will) they all concurred in the foregoing views, as we have seen. In that case the testator, being incapable of moving himself, was placed after he had signed the will with his face to the wall and his back to the witnesses when they subscribed the will, so that although in the same room with the witnesses, he did not, and could not by the exercise of any power which he possessed, have seen the witnesses subscribe the will; although in the same room with him, they were not within the scope of his vision, and he had no power to bring them within it. In that case a majority of the judges held that they were not in his presence.

This case has met with some disapproval from some of the judges of this court in subsequent decisions, but has been followed, and

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is relied on by the counsel for the appellant here as conclusive of this case. But each case is, as to this question, dependent upon its own circumstances. In this case the witnesses were not only in the same room but within the line of vision of a conscious and capable, and consenting testatrix, who could, and who, as far as this evidence goes, did see the attesting witnesses subscribing the will which she had herself just heard read in a clear and distinct voice, and had then signed legibly with her own hand.

Judge MONCURE, speaking for this court in the case of *Nock v. Nock*, 10 Gratt. 119, says of the case of *Neil v. Neil*, *supra*: "Its effect has been to modify in this State the general rule and add thereto this proviso: that if the testator be physically unable to change his position, the witnesses must make their subscriptions within the range of his vision." And then remarks: "The word 'room' does not occur in the statute, nor does the word 'sight.' 'Presence' is the only word there used, and when it exists, sight is unnecessary and the statute is satisfied. A blind man can make a will, which of course he could not do if sight were necessary. *

* * Proximity and consciousness may create presence. Will they (the witnesses) be considered as not in his (the testator's) presence merely because, in the actual position which he happens to be, he cannot see their forearms and writing hands, and the paper itself? The statute says nothing about forearms or writing hands, or seeing the will itself. It requires the witnesses to subscribe their names in the testator's presence. He cannot, in the nature of things, see their whole persons at the same time. They are in his presence, whether their faces or their backs are toward him. And if being in his presence they subscribe their names, the statute is literally complied with. There is not even a slip of form, and the attestation is good. If he does not choose to see when he can so easily see the forearms and writing hands, and paper itself, and when he sees and hears that the attestation is going on, it is the same thing as if he had actually seen them." Citing the case of *Shires v. Glascock*, 2 Salk. 688; *Davy v. Smith*, 3 Salk. 395; and also *Casson v. Dade*, 1 Bro. C. C., *supra*.

The case of *Graham v. Graham*, 10 Ired. 219, relied on as authority here, cannot be so considered. In that case the witnesses were out of the presence of the testator, out of the room, and the testator could not see them where he laid in his bed. But the contention was that by looking around the door-post he might have

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seen them. Judge RUFFIN held that the subscribing by the witnesses was not in the presence of the testator, and it was quite clear, I think, that the testator knew nothing of his own knowledge of the subscribing by the witnesses, and he could not have so known of it in the situation in which he was left.

This is equally true of the cited case of *Robinson v. King*, 6 Ga. 539.

The case of *Aiken v. Weckerly*, 19 Mich. 482, is also relied on by the appellant, but an examination of that case shows that it was unanimously held that "the condition and position of the testator, when his will is attested, and in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward and is mentally observant of the specific act in progress; and unless he is blind, the signing by the witnesses must occur when the testator, as he is circumstanced, may see them sign, if he chooses to do so."

See also the case of *Cheatham v. Hatcher*, 30 Gratt. 56; opinion of Judge STAPLES and the authorities he cites.

Upon a review of the evidence in this case and of the foregoing authorities, it is clear, we think, that the will in question in this case was duly executed in accordance with the statutes of this State. And upon the whole case, and a consideration of all the questions discussed by the learned counsel here, we are of opinion that there is no error in the decree of the Chancery Court of Richmond city sustaining the validity of the said will, and the same must be affirmed.

Decree affirmed.

TARDY V. CREASY.

(81 Va. 553.)

Covenant — personal — restraint of trade.

Tolbert owning three hundred and sixty-eight acres of land at a railway junction, sold five and one-half acres thereof to Tardy, with exclusive mercantile privileges at, in, and around the junction, including the exclusive right to sell goods, wares and merchandise; to keep houses of public entertainment and refreshment; to establish and erect warehouses, factories, foundries and shops on the tract of three hundred and sixty-eight acres, and providing that the said covenants should apply to his heirs or assigns, who might be deprived of these privileges, and should run with the said land of Tolbert to whomever it might be devised or conveyed. Subsequently, Tolbert conveyed

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one acre to Roach, "restricting him from any mercantile privilege, the same having been conveyed to Tardy." Roach conveyed the same with general warranty without restriction to Creasy, who established a mercantile business thereon. On a bill by Tardy to enjoin Creasy from selling goods, etc., on said acre, *held* that, (1) These covenants are personal, binding the grantor; (2) They do not run with the land; (3) They are in general restraint of trade and void as against public policy. (*See note, p. 686.*)

BILL for injunction. The opinion states the case. The bill was dismissed below.

John Gilmer and E. C. Burks, for appellants.

Green & Miller, George T. Hison and W. W. Gordon, for appellees.

LACY, J. The case is as follows: Tolbert conveyed to A. H. Tardy five and one-half acres of land, at the junction of the narrow gauge railroad with the Washington City, Virginia Midland and Great Western railroad, between Galveston and Ward's Springs, with general warranty. The said Tolbert being seised of a tract of three hundred and sixty-eight acres around the said junction, covenanted in the deed with said Tardy, that he was to have the exclusive mercantile privilege, and all rights pertaining thereto, at, in, and around said junction, and agreed to forfeit \$500 for any breach thereof by him. Subsequently, in 1879, Tolbert, by deed reciting that the aforesaid deed did not fully express the desire and intention of the said parties, and declaring an intention to perfect and carry into effect said intention, conveyed with general warranty to the said Tardy, "the exclusive right to sell wares, goods and merchandise; to keep houses of public entertainment or refreshment; to establish and erect warehouses, factories, foundries and shops on said tract of five and one-half acres, or on any lands or lots subsequently purchased by said Tardy, or that may hereafter be purchased, or on any part of the lands now owned by said Tolbert at and adjoining said five and one-half acre tract, which said lands embrace, by estimate about three hundred and sixty-eight acres of land, and is that portion of the lands conveyed to him by E. H. Dillard and wife, which he, said Tolbert, has not hitherto sold. But this deed shall not authorize said Tardy, or his assigns, to erect any house, or to carry on any business on any of said lands, except such as he may have or may hereafter purchase, although said Tolbert, his heirs or assigns, are hereby deprived of the privileges hereinbefore enume-

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rated, this deed running with the lands of said Tolbert to whomsoever hereafter devised or conveyed. It is however agreed between said parties, that the said Tardy shall have right to convey any of the privileges herein enumerated on any of his lands purchased, or that may hereafter be purchased, to any person; and said Tardy and Tolbert, by joint deed, both agreeing thereto, convey said privileges on the balance of the lands of said Tolbert.

Tardy and wife conveyed one-half interest in their purchase to S. C. Tardy, Jr.; Tolbert and wife subsequently conveyed one acre of the three hundred and sixty-eight acre tract to Roach, with general warranty, "restricting however the said Roach from any mercantile privileges, the same having been heretofore conveyed to A. H. Tardy." Roach conveyed by deed, with general warranty, to the appellee, Creasy, the said one-acre parcel of land bought by him without restriction. Creasy established a mercantile business on the land bought of Roach, having formed a copartnership with T. C. Creasy, under the name and style of T. C. Creasy & Co. A. H. Tardy and S. C. Tardy, Jr., filed their bill in the Circuit Court of Pittsylvania county, having for its object to restrain and enjoin T. C. Creasy & Co. from selling goods, wares and merchandise on said parcel of one acre of land, or from otherwise trespassing on the alleged rights of A. H. and S. C. Tardy.

On the hearing this bill was demurred to by Creasy & Co., "1. Because said bill is without equity on its face, and is not sufficient in law. 2. Because S. C. Tardy, Jr., was improperly joined as a co-complainant. 3. Because Tolbert was not made a party."

The Circuit Court of Pittsylvania sustained the demurrer and dismissed the bill with costs, and the case is here upon appeal from that decree. The Circuit Court held that the undertakings of Tolbert in his said deeds were personal covenants merely, not extending to Creasy & Co., by which they were not bound; that the said covenants did not run with the land, but were collateral, and imposed no burden upon the said land annexed thereto as an easement or servitude.

The appellants contend that the covenants in the Tolbert deeds affixed an easement to the lands of Tolbert unsold, and the said covenants being attached to the said lands adhered to them in the hands of all holders forever, running therewith, parcel of the same, an interest in the land, passing with the land to which it is annexed to the assignees thereof.

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We may define an easement to be "a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former." *Stevenson v. Wallace*, 27 Gratt. 87; *Goddard Easements*, 2.

It has been defined to be "a right which one proprietor has to some profit, benefit or beneficial use, out of, in, or over the estate of another." *Ritger v. Parker*, 8 Cush. 147. "A charge or burden upon one estate, the servient, for the benefit of another, the dominant." *Marison v. Marquardt*, 24 Iowa, 35. "A liberty, privilege, or advantage which one may have in the lands of another without profit." *Big Mountain Improvement Co.'s Appeal*, 5* Penn. St. 361.

An easement is a right which is appurtenant to the dominant tenement, and imposed upon the servient tenement; and it is important to mark that it is not imposed upon the person of the servient owner; therefore an obligation upon him to do something for the benefit of the dominant tenement is not an easement. Then an easement which a land-owner may lawfully acquire, and which may be affixed to the land as a burden upon the servient and for the benefit of the dominant tenement, such as the well-known easements, a right to light, or a right of way, a right to support for land and buildings, rights relating to the flow of water, rights relating to purity of water, rights relating to the taking of water for use. Besides such well-known easements, attempts have been made to establish other easements, which the law does not recognize, and to annex them to land; but the law will not permit a land-owner to create easements of every novel character and attach them to the soil.

But there are many other easements which have been recognized, and some of them have been of a novel kind. And although some novel right has been granted by a land-owner to another person which may be valid and binding upon him personally, so long as he continues owner of the *quasi* servient tenement, so that on disturbance he may be sued for breach of covenant, yet if such right be of such kind that the law does not recognize as capable of being annexed to the soil, that right, good against the covenantor, is void as against other persons than the grantor, and will not entitle the grantee to sue for the benefit in his own name, on the one hand.

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nor annex to his premises the burden on the other. As has been said, "a new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of an estate; he must be contented to take the sort of estate, and the right to dispose of it, as he finds the law settled by decisions or controlled by act of parliament." POLLOCK, C. B., in *Hill v. Tupper*, 2 Hurl. & Colt. 121.

This rule is well stated in a noted English case. After speaking of the certain known incidents to property and its enjoyment, and the burdens wherewith it may be affected or rights which may be created and enjoyed over it by parties other than the owner, the chancellor said: "All these kinds of property however all these holdings, are well known to the law and familiarly dealt with by its principles; but it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient, both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives—that is, their assets, real and personal—to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote." *Keppell v. Bailey*, 2 Mylne & Keen, 535.

In this case certain persons had formed themselves into a company for the establishment of a railroad, called the Trevie. The Keppells, who held the Beaufort Iron Works under a long lease, had covenanted with the proprietors of the railroad and their assigns, that the Keppells, their executors, administrators and assigns, would procure all the limestone wanted for the iron works from the Trevie quarry, and carry it along the railroad, paying a certain toll. The Keppells assigned their lease of the iron works to the defendants, who began to construct a railroad to other lime quarries, situated eastward of the Trevie quarry; and on a bill for an injunction to restrain them from using that or any other new road, it was, among other points, objected to the covenant that it was void as tending to create a perpetuity, as a restraint of trade. and that it

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was not such a covenant as would run with the lands, so as to bind the defendants as assignees of the iron works.

The objection that it tended to create a perpetuity was overruled. The objection that it was in restraint of trade was overruled; the covenant in that case being considered not in general restraint of trade, but only in partial restraint of trade and not void.

In regard to the main question, whether the covenant was capable of running with the Beaufort Iron Works, so as to bind the defendants as assignees thereof, the lord chancellor held that it was not, and after using the language cited above, remarked further: "That every close, every messuage, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple character, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land, to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints as infinite in variety as the imagination can conceive." *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, *supra*; *Duke of Bedford v. Trustees of the British Museum*, 2 Mylne & Keen, 552; *Randall v. Rigby*, 4 M. & W. 130; *Spencer's case*, 25 Eliz. Pasch.; 5 Coke, 16; 1 Smith Lead. Cas. 137, notes and cases cited by Hare & Wallace.

In the case of *Taylor v. Owen*, decided by the Supreme Court of Indiana in 1830 (2 Blackf. 301; s. c., 20 Am. Dec. 115) which was a case similar to this, BLACKFORD, J., in delivering the opinion of the court, said: "The idea of the complainant, that the covenant in question was a conveyance to him of the exclusive right of vending merchandise in New Harmony cannot be sustained. Such a right of the proprietor of real estate to carry on trade upon his premises cannot be made the subject of a separate conveyance, so as to prevent the subsequent holder of the property, without his own agreement, from pursuing his lawful business there. This agreement between Owen and Taylor is entirely of a personal nature. It neither runs with the land of the covenantor, nor does it create any lien thereon, either legal or equitable. Had the fee simple of the premises occupied by Moffat

been sold or conveyed to him by Owen, it seems to us very clear, that the purchaser's title could not have been affected, nor his rights arising from ownership diminished by the collateral agreement alluded to. A lessee for years stands in the same situation in this respect as a vendee. A *bona fide* vendee or lessee of real property, for a valuable consideration, has nothing to do with these personal contracts. Whilst Owen had the rightful possession of the whole town, he had of course a right to a monopoly of the business. This monopoly he had it in his power to permit the complainant to enjoy by not selling any of the property to any other person, or leasing any of it without inserting in the leases the necessary restrictions. If the covenant between Owen and Taylor respecting the exclusive right, referred to, be valid, as to which we give no opinion, Taylor's remedy is by a suit at law against Owen for a breach of the contract."

In the case of *Brewer v. Marshall*, decided in the Court of Chancery of New Jersey in 1867 (18 N. J. Eq. 337), ZABRISKIE, chancellor, after reviewing *Spencer's* case, *supra* (5 Coke, 16), said: "In this case the covenant, though not to be performed on the twelve-acre lot, is yet alleged to be touching or concerning it, and therefore may be held to pass to the assignee of the lot. It is true that selling marl from the rest of the Swope farm would not affect the twelve-acre lot or its use or enjoyment, but it might affect the market value of the marl dug from it." And the covenant not to sell marl from the tract of land, or not to carry on any specific business upon it, was held not to create an easement or impose a servitude, but to be only a personal covenant. Citing *Mayor of Congleton v. Pattison*, 10 East, 130; *Kepper v. Bailey*, *supra*; *Hurd v. Curtis*, 19 Pick.; *Brewster v. Kidgel*, 12 Mod. 166; *Bally v. Wells*, 3 Wils. 29; *Plymouth v. Carver*, 16 Pick. 183, and remarking: "The exclusive right of carrying on a trade upon one lot is not an easement; and although a covenant not to carry on such trade upon his adjoining property may bind the covenantor, he cannot make it a servitude upon that property, so as to burden it in the hands of purchasers."

On appeal to the Court of Errors and Appeals, the chief justice delivered the opinion of the court affirming the decision of the chancellor in 1868, 19 N. J. 540; he said: "I quite agree that the covenant under consideration neither runs with the land, nor is it, in effect, the grant of an easement." See the opinion of BEASLEY, C. J., and cases cited therein.

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The covenants, by Tolbert, in his deeds to Tardy, which have already been recited in full, amount to a contract on the part of Tolbert that he will abstain from all sorts of business on the land owned by him, of three hundred and sixty-eight acres, in and around the junction, including the right to sell wares, goods and merchandise; to keep houses of public entertainment and refreshment; and to establish and erect warehouses, factories, foundries, and shops; and that the same should apply to his heirs and assigns, who should be deprived of these privileges, and should run with the lands of the said Tolbert to whomsoever hereafter devised or conveyed.

These covenants cannot be said to be in partial restraint of trade only, and therefore not void, for while they apply to a particular parcel of land, they apply to all business which could be carried on. It would be difficult to devise any trade which would not come within the terms employed — sell goods, etc., warehouses, factories, foundries and shops. They constitute a general restraint of trade, and cannot be enforced by the court as annexed to the land; they are not for a term, but for ever, attempting to bind heirs and assignees; if enforced they establish forever a novel holding of these lands. Tolbert had the right to make this contract for himself, and for his land so long as he held it; indeed, he had the right to bind his estate, real and personal, to these covenants, so long as he held it; but passing out of his hands to a purchaser can he annex these covenants to the land forever in the hands of all future holders? We think not.

These covenants are in general restraint of trade, and are void as such, so far as they affect the land in the appellee's hands, who is the vendee of Roach, who was the vendee of Tolbert. They cannot be held to be easements, as abundantly appears from what has gone before. They are not covenants which can be held to be of such a nature as to impress themselves on the land burthened, for the benefit of some other property; they are covenants collateral to the land merely — personal covenants which cannot be annexed to the land. And this case must be distinguished from the cases of *Tulk v. Moxhay*, 2 Phila. 774; *Whitman v. Gibson*, 9 Sim. 196; *Schreiber v. Creed*, 10 Sim. 35; *Woodruff v. The Water Power Company*, 2 Stockt. 505. They do not constitute an interest in the thing granted, nor do they attach an equity to the property.

The cases of *Hill v. Miller*, 3 Paige, 254; *Watertown v. Corden*, 4 Paige, 510; *Barrow v. Richard*, 8 Paige, 350, relied on here, are

where the covenant created an easement either by reservation in the land granted, or by grant in other lands of the grantor.

The right to light and air without obstruction from buildings on the adjoining lands is a well-known species of easement; and the right to enjoy the pure air without being laden with odors or dust, or disturbed by disagreeable sounds, is of a like nature. They are easements that may be attached to one parcel of land, and the burden of not erecting any thing that would disturb such enjoyment is a servitude that may be impressed upon another. But the exclusive right of carrying on a trade upon any lot is not an easement; and although a covenant not to carry on such trade upon his adjoining property may bind the covenantor, he cannot make it a servitude upon that property so as to burden it in the hands of purchasers. For a review and limitation of *Tulk v. Moxhay, supra*; *Morland v. Cook*, L. R., 6 Eq. 252; *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27; *Cooke v. Chilcoll*, 3 Ch. Div. 694; see the recent case of *Austerberry v. Corporation of Oldham* (1885), 29 Ch. Div. 750.

The case of *Stines v. Dorman*, 25 Ohio St. 583, is not in conflict with the foregoing views, but proceeds upon different circumstances. That WHITE, J., says, was not a contract in general restraint of trade, but it is limited in its application to a particular species of property, and forbids its use to a particular business. That case, I think, proceeds from its own circumstances, and the decision is based solely thereon; the court waived the main question, "whether the stipulation contained in the deed in question is to be regarded technically, as a covenant running with the land." It can be regarded only as authority between the parties thereto, and is authority for that case only. It is not claimed that there is any legal remedy by which these covenants can be annexed to the land. If equity will enforce them, then there are perhaps no cases where it would be denied, and the owner of land may impress upon land any notion his caprice may suggest. And as has been observed by a learned judge, equity would see to it that the land shall retain such impress in the hands of every subsequent holder. And if a vendor covenants with a vendee that he will never, nor shall his assigns ever, raise grain, nor permit a dwelling-house to be put thereon, it is clear, says that judge, that at law such covenants as this will not become parcel of the land so as to fetter it in its devolutions. The remedy for their breach, if intrinsically legal, is by suit against the original covenantor. If an agreement that marl

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shall not be sold upon a particular tract of land will pass as a burden upon such land in equity, it will be difficult to hold that in the examples just put the same result is not to obtain.

Thus incidents can be annexed to land as multiform and as innumerable as human caprice. The inconvenience of giving such latitude to the power of the owner of lands is forcibly put by Lord BROUGHAM in *Keppell v. Bailey*, whose judgment in that case has been cited with approbation, and followed in many recent cases.

Although any burden of a new species which the owner thinks proper to impose on his land, is not an easement which can be made appurtenant to land, yet such an obligation is perfectly valid as between the grantor and grantee of the right; and if the grantee is disturbed in his enjoyment by the grantor, the law will afford him ample remedy by action on covenant for the injury; and in the event of his being disturbed by a stranger, he may sue for such disturbance in the name of the grantor. The covenant in that case failed to run with the land, because the rights and restrictions which it imposed on the one hand, or conferred on the other, went beyond the limits of any estate or interest in land known to the law, or which it will permit to be invested with the capacity of assignment or transfer; and sound policy will not permit an end to be obtained by a covenant which cannot be directly affected by grant. Covenants should have as wide range as grants; they should not be allowed to go further, or subject land to restrictions — to diminish its utility to the owners and to the community at large.

We think the covenants upon which this case rests are collateral merely — purely personal — not touching the land; that they are void as in general restraint of trade, and are against public policy and not such as the law will recognize or enforce, and which are incapable of being annexed to the land. The appellee holds title to the land in question by deed without restriction, and he cannot be affected by the merely personal covenants between Tolbert and Creasy. The other grounds of demurrer are not necessary to be noticed; they are included within the foregoing.

We are of opinion that the demurrer to the bill was properly sustained by the Circuit Court, and that there is no error in the decree appealed from, and the same must be affirmed.

Decree affirmed.

RICHARDSON and HINTON, JJ., concurred; LEWIS, P., and FAUNTLEROY, J., dissented.

NOTE BY THE REPORTER.—LEWIS, P., dissenting, said: "The case in 2 Blackf., cited in the opinion, was decided before, and is in harmony with the decision in *Keppell v. Bailey*, and the New Jersey case, also much relied on, follows that decision. But the case of *Keppell v. Bailey* is no longer regarded as authority even in England, at least so far as it relates to the effect of notice of a covenant like the one in question. Such is the language of FRY, J., in the recent case of *Luker v. Dennis*, 7 Ch. Div., and see also *DeMattos v. Gibson*, 4 De G. & J. 232; *Catt v. Tourle*, L. R., 4 Chy. 674.

"I think the case is analogous in principle to *Hill v. Miller*, 3 Paige, 254, decided by Chancellor WALWORTH, and to *Stines v. Dorman*, 25 Ohio St. 580, decided in 1874. In other words, the covenant with the appellant ought, in my opinion, to be construed in equity as creating an easement on the unconveyed land and appurtenant to the land conveyed. See notes to *Spencer's* case, 1 Smith Lead. Cas. 145 *et seq.* (8th Am. ed.); Goddard on Easements, 2; *Stevenson v. Wallace*, 27 Gratt. 87.

"In Kerr on Injunctions, 530, it is said: 'The jurisdiction of courts of equity over contracts and covenants is not confined to cases where an action at law can be maintained, but extends to cases where an action at law is not maintainable. It is in many cases a matter of much doubt whether a covenant with respect to the use and occupation of land runs with the land, so as to bind at law an assignee, although assigns be expressly named in the covenant; but covenants controlling the enjoyment of land, though not binding at law, will be enforced in equity, provided the person into whose hands the land passes has taken it with notice of the covenants. 'The question,' said Lord COTTENHAM, 'is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.' And on the next page the author says: 'A contrary doctrine was laid down by Lord BROUGHAM in *Keppell v. Bailey*, 2 M. & K. 517, but that case can be no longer considered as an authority.' See also Sugden Vendors, 801, 808.

"I do not think the covenant is illegal on the ground that it is in restraint of trade. The restraint is not general, but relates to certain enumerated privileges on a particular parcel of land, and is, in my opinion, reasonable. I do not think the rights of owners of property to deal with it as was done in the present case ought to be fettered and restricted as is done by the judgment in this case. Without however entering into any discussion of the question, I content myself with simply referring to *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Cowell v. Springs Co.*, 100 U. S. 57; *Stines v. Dorman*, *supra*, and the notes to *Mitchell v. Reynolds*, 1 Smith Lead. Cas. 756, where the cases are collected."

See *Gilmer v. Montgomery, etc., R. Co.*, 79 Ala. 569; s. c., 58 Am. Rep. 623.

In *Mandeville v. Harman*, 42 N. J. Eq. (15 Stew.) 185, it was agreed between A. and B., physicians, at Newark, that the former should serve the latter in his professional business, for a specified period, less than two years, at a fixed monthly compensation, and a contingent compensation in addition, and that A. should never engage in the practice of medicine or surgery at

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Newark. *Held*, that the latter agreement was unreasonable and void. See *Timmerman v. Dever*, 52 Mich. 34; s. c., 50 Am. Rep. 240; *Wiley v. Baumgardner*, 97 Ind. 66; s. c., 49 Am. Rep. 427; *Smalley v. Greene*, 52 Iowa, 241; s. c., 35 Am. Rep. 267; *Cook v. Johnson*, 47 Conn. 175; s. c., 36 Am. Rep. 64. VAN FLEET, V. C., said: "The covenant under consideration is a contract in restraint of trade. Such is the designation universally applied to such engagements. And no principle of law is more generally recognized than that a contract which precludes a person from the right to employ his talents, his industry, or his capital, in any useful undertaking, is void. Whether the restraint be general or partial, Mr. Justice BRONSON says the law starts out with the presumption that a contract in restraint of trade is void; and it is only by showing that the contract is good that this presumption will be rebutted. The rule is not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable; and the restraint is reasonable when it imposes no shackle upon the one party which is not beneficial to the other. *Ross v. Sadgbeer*, 21 Wend. 168.

"The authorities are uniform that such contracts are valid when the restraint they impose is reasonable, and the test to be applied, in determining whether the restraint is reasonable or not, prescribed by Chief Justice TINDAL, in *Horner v. Graves*, 7 Bing. 735, and uniformly adopted in subsequent cases, is this: To consider whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy, as being injurious to the interests of the public. The rule, as just stated, is the law of this State. Chief Justice BEASLEY, in pronouncing the judgment of the Court of Errors and Appeals, in *Brewer v. Marshall*, 19 N. J. Eq. 547, said: 'And so far as this principle (that contracts in restraint of trade are void) been carried, that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly held that such agreement will be void, unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other.' This is the rule by which the validity of the covenant on which the complainant relies must be tried.

"The fault imputed to the covenant is that the restriction which it imposes is to endure for an unreasonable period of time—for a much longer period than will be necessary for the protection of the complainant. It interdicts the defendant, it will be observed, from practicing medicine or surgery in the city of Newark at any time hereafter. The restraint covers the whole period of the defendant's life; and if an injunction is awarded enforcing the covenant according to its terms, the defendant can never, at any time hereafter, practice his profession in the city of Newark, though the complainant may the next year, or even the next month, after the injunction issues, lose his life or his reason, or remove to another field of practice. Under such circumstances the injunction would give no protection to the complainant; he would

need none, and the only purpose the injunction could serve would be to causelessly oppress the defendant. The Court of King's Bench, in *Hitchcock v. Coker*, 6 Ad. & El. 438, held a similar contract void. The defendant there had entered the service of the plaintiff, who was a druggist carrying on his business in the town of Taunton, as the plaintiff's assistant, under a written contract whereby he agreed, in consideration of the salary to be paid to him by the plaintiff that he would not at any time after leaving the plaintiff's service, engage, either directly or indirectly, in the business of a chemist and druggist within the town of Taunton. After leaving the plaintiff's service, the defendant violated his contract. The plaintiff sued him, and had a recovery. The court, in pronouncing judgment on a motion in arrest of judgment, by Lord DENMAN, C. J., said: 'The agreement as to the time is indefinite. It is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff; but it attaches to the defendant as long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead. * * * In the absence of any authority establishing the validity of an agreement thus indefinite in point of time, and trying the reasonableness of it by the test given in *Horner v. Graves*, we think that the restraint is larger than the necessary protection of the party in favor of whom it is given requires, and that it is therefore unreasonable and oppressive.' Judgment was given for the defendant. The case was then taken by writ of error to the Exchequer Chamber, and there the judgment of the King's Bench was reversed. The reversal was put distinctly on the ground that a restriction, so extensive in point of time, was necessary for the protection of the promisee or covenantee in the enjoyment of the good-will of his trade, and should therefore be held to be reasonable. Chief Justice TINDAL, in delivering the opinion of the court, said: 'The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader; and if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed. If therefore it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade, in the same town in which his master lives, so long as the master carries on the trade there, we cannot think, it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative.' 6 Ad. & El. 453. This doctrine has been adhered to in subsequent cases, and is now the established law of Great Britain. *Pemberton v. Vaughn*, 10 Q. B. 87; *Eloes v. Crofts*, 10 C. B. 241; *Atkyns v. Kinnier*, 4 Exch. (W., H. & G.) 782.

"The legality of restrictions of this kind is put, it will be observed, exclusively on the ground that they must be upheld as valid, to prevent the destruction of a property right, or interest called the good-will of a trade or business. This right or interest, in this country, is without a well-defined legal character. It would seem that it is scarcely possible for it to exist even in England, where it has received repeated judicial recognition, except in connection with.

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a store or shop or some other permanent place of business; for Lord ELDON defined it as nothing more than the probability that the old customers will resort to the old place (*Cruttwell v. Lye*, 17 Ves. 846), and Lord CHELMSFORD has said concerning it, that when a trade is established in a particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. *Austen v. Boys*, 2 DeGex & J. 626. Its existence as property in this country has received more decided recognition in cases involving the disposition and distribution of partnership assets than in any other class of cases, but even in such cases it can only exist, says Mr. Justice STORY, where the partnership conducts a commercial business or trade, and that it does not exist where a professional business is carried on by copartners; for in such cases the amount of business done by each member of the firm depends almost entirely on the confidence reposed in him personally as a professional man. *Story Partn.*, § 99. Sir JOHN LEACH, V. C., in *Farr v. Pearce*, 3 Madd. 74, held that on the death of one of two surgeons who were conducting business as copartners, the survivor was not obliged, in the absence of a contract requiring him to do so, to give up the business and sell the practice, but that he had the right to continue the practice and take all the emoluments arising therefrom.

"Professional skill, experience and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person and die with him. There can be no doubt, I think, that if the complainant was the most distinguished physician of the city of Newark, and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month or next year, it would be impossible for his personal representative to sell his good-will or practice, as a thing of property distinct from the office which he had occupied prior to his death, for any price; and I think it is equally obvious that if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there for the next occupant of the office. The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither intrinsic nor market value. And if the complainant should make sale of his practice in his life-time, it is manifest all the purchaser could possibly get would be immunity from competition with him, and perhaps his implied approval that the purchaser was fit to be his successor; but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had.

"These considerations make it apparent, I think, that the reason which induced the Court of Exchequer Chamber to hold a like restraint valid in *Hitchcock v. Coker* does not exist in this case. There a right or interest existed, which according to the law of Great Britain would on the death of its possessor pass to its personal representative. No such right or interest exists here. At least its existence is as yet unrecognized in this State by law. No court of law

of this State has as yet decided that a covenant between professional gentlemen, so extensive in duration as the one under consideration, is valid. There is strong reason to doubt its validity. It is one of the natural rights of every citizen of this State to use his skill and labor in any useful employment, not only to get food, raiment and shelter, but to acquire property; and I think it may be regarded as very certain that the courts will never deprive any one of this right, or even abridge it, except in obedience to the sternest demands of justice.

"Chief Justice BEASLEY, in speaking of the covenant on trial in *Brewer v. Marshall*, *supra*, said that the restraint which it imposed was general, as to time, place and person, and it therefore transcended by far the limits of utility to the covenantee, and must for that reason be declared void.

"And Chief Justice WOODWARD, in *Keeler v. Taylor*, 53 Penn. St. 469, declared that such contracts, if they were not limited to a reasonable time as well as confined to a reasonable space, were void at law. He said also that if the terms they imposed were at all hard, equity would not enforce them.

"Vice-Chancellor SHADWELL had previously given expression to the same view in *Kimberly v. Jennings*, 6 Sim. 352. Besides no one can fail to see, that if this covenant is valid and enforceable in equity, then it is competent for every merchant and trader, when he employs a clerk or shop-girl, to require them, although the compensation he agrees to pay is no greater than that which is customarily paid for such service, to enter into a covenant that on quitting his service they will not, at any time afterward, accept like employment from any other merchant or trader in the same town or city, and that if such covenants are made, and are subsequently broken, it will be the duty of this court to enforce them, though the consequence may be that a citizen will thereby be deprived of his only means of supporting himself and his family. It may be well doubted, I think, whether legal rules, producing such consequences, will ever be established merely by force of judicial action.

"The conspicuous defect of the complainant's case is that the legal right on which he founds his claim to an injunction is not clear. No court of this State has ever declared that a covenant like that on which the complainant rests his claim is valid. On the contrary, it appears that the general legal presumption is against the validity of such covenants. In this position of affairs, the duty of the court is plain; for in the language of Chief Justice BEASLEY, no rule of equity is better settled than the doctrine that a complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 304."

In *Smith's Appeal*, Penn. Sup. Ct., Oct. 4, 1886, A., by a contract, for a valuable consideration, agreed with B. that he would not thereafter engage in the business of manufacturing ochre "in the county of Lehigh or elsewhere." He subsequently went into the business of manufacturing ochre in Lehigh county, and upon a bill for injunction to restrain him from continuing the same being filed by B., he answered that his contract was in restraint of trade, and therefore contrary to public policy. *Held*, that the contract was divisible as to place; that while it was void outside of Lehigh county, it was good

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within the county; that it was competent for A. to make the contract; and that it was reasonable and not oppressive. A contract restraining one of the parties from the exercise of a trade within a limited locality, when there is reasonable ground for the restriction is valid. Inquiry will not be made into the adequacy of the consideration. Its value will not be measured against the uncertain value of the right to carry on the trade or business. If it be reasonable it is enough. *McClurg's Appeal*, 58 Penn. St. 51. The covenant as to place, "in the county of Lehigh or elsewhere," is divisible and valid as to the county. For the present it is conceded to be void elsewhere. This point was decided in a case where the party agreed not to engage in a particular business in Cincinnati or elsewhere. *Thomas v. Miles*, 8 Ohio St. 274. Other cases are cited by the learned judge of the Common Pleas sustaining the same doctrine. None to the contrary was referred to at the argument. Where a county or city or borough is named as a limit and an unreasonable extent of territory in addition is also named, the covenant is divisible, and may be valid as to the particular place which is a reasonable limit. It has been said that all the cases, when they come to be examined, seem to establish this principle—that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: public policy requires that every man shall not be at liberty to deprive himself or the State of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to so sell it, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such case the same public policy enables him to enter into any stipulation, however restrictive it is, provided the restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. *Leather Cloth Co. v. Loresont*, 9 Eq. Cas. 345.

In *Baines v. Geary*, 57 L. T. Rep. (N. S.) 567, T. G. agreed to enter the employment of C. B., a dairyman, as milk carrier at weekly wages, the service to be determinable at two weeks' notice on either side. And T. G. undertook that he would not "either during such service or after being discharged or quitting such service, serve or cause to be served for his own benefit, or that of any other person or persons, either directly or indirectly, or cause to be interfered with in any way any of the customers served or belonging at any time to the said C. B., his successors or assigns." Afterward T. G. set up in business as a dairyman on his own account, and solicited and obtained the custom of some persons whom he had served as carrier for C. B. *Held*, that a covenant in restraint of trade is divisible in point of time, and will be enforced so far as it is reasonably necessary for the protection of the covenantee; that the present covenant would be reasonable so far as it prevented T. G. from serving any person who had been a customer of C. B. during T. G.'s employment by him, and to that extent must be enforced. The court, NORTH, J., said: "It is argued, that unless the covenant in the case before me is limited to

persons who were customers of the plaintiff Baines at the time when it was entered into, or at any rate, who became such during the period of the defendant's employment, it would be too extensive, and that a covenant, the terms of which are too extensive, must fail altogether. The terms of the covenant in this case are, no doubt, wider than those of the covenant in *Rannie v. Irvine*, 7 Man. & Gr. 869. But it is quite clear that a covenant in restraint of trade is good if it does not go further than is necessary for the reasonable protection of the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantee. The courts have however seen their way to treat such a covenant as divisible, and to enforce it to the extent to which it is reasonable while declining to enforce that part of it which is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space. *Price v. Green*, 16 M. & W. 846." "No case however was cited to me in which a covenant of this kind has been held to be divisible in regard to time. I postponed judgment in order that I might see if any such case has been reported, and I found the case of *Nicholls v. Stretton*, 3 L. T. Rep. (O. S.) 117; 7 Beav. 42. In that case the defendant, on being articulated to the plaintiff, a solicitor, covenanted that he would not during the five years of his articles, nor at any time after the expiration of the term, either directly or indirectly, interfere or intermeddle with or be concerned as attorney, agent or otherwise, for any person who had already been, or who should from time to time thereafter become, or be the client or correspondent in business of or with the plaintiff, or any partner or partners he might admit to a share or shares with him, or any person or persons to whom he might sell or assign the whole or any part of his business or profession of attorney, solicitor or conveyancer. Lord LANGDALE, M. R., held that the covenant was not too extensive, and granted an interlocutory injunction to restrain the defendant from interfering or intermeddling with, or being concerned as an attorney, agent or otherwise, for any client or correspondent of the plaintiff, or of the plaintiff and his partners, in the plaintiff's business of an attorney, solicitor or conveyancer. A note to the report states that an appeal was presented from the decision, and a case was directed to a court of law. Either the case, or an action for damages for breach of the covenant, came before the Court of Queen's Bench in *Nicholls v. Stretton*, 10 Q. B. 848. In that action two sets of breaches of the covenant were relied on by the plaintiff. The first was in respect of persons who had been clients of the plaintiff before and at the time of the defendant's entering into the covenant; the second was in respect of persons who became clients of the plaintiff afterward, while the defendant continued his articulated clerk. As the judgment of the court was very short, I must refer to the arguments of counsel. Mr. Bramwell for the defendant, who had demurred, contended that 'such a covenant almost puts it in the power of the plaintiff to exclude the defendant from all business whatever, and it is much more extensive than can be required for the protection of the plaintiff; there is no limitation as to time or space. Here he would have been fully secured against the loss of business from the opportunities which he gave the defendant by a covenant,

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that the defendant should not be concerned for any one who had been the plaintiff's client before, or at the time of the defendant's being with him. * * * But it will be argued that the covenant is good for a part, and that the good part may be severed from the bad. Now, first, the contract is a whole, and every covenant on the one side is in consideration of every covenant on the other; and if any part be void the whole is void.' He went on to argue that there could be no distinction on the ground that the contract was under seal. Mr. Cowling, for the plaintiff, argued, that 'even without separating the parts of the covenant there is no more protection than the particular profession requires, the defendant being restricted only as to persons, and not as to place or time.' In the course of his argument Lord DENMAN, C. J., said: 'The body of customers here may alter from time to time. Could you enforce a covenant prohibiting a man from dealing with such persons as you might name from time to time?' Mr. Cowling then contended that 'the covenant is at least good so far as it concerns the clients, who carried on business with the plaintiff at the time of making the indenture or during the continuance of the articles; and the breaches are confined to these. It is true that when any covenant, whether under seal or not, is in part illegal, the whole contract fails. But that is different from the present case, where the contract is, not to do any thing illegal, but only to abstain from certain acts, some of which a party cannot bind himself not to do but may still legally abstain from doing. In such a case the law will enforce such restrictions as the party can bind himself to.' Mr. Bramwell replied and the court took time to consider their judgment. Lord DENMAN, C. J., delivered the judgment of the court thus: 'This case must be decided in favor of the plaintiff in conformity with *Price v. Green* in the Exchequer Chamber.' 16 M. & W. 346. That decision is precisely in point, and it shows that though the terms of the covenant are large enough to include all the persons who might be clients of the plaintiff at any time, still it was separable and was at any rate good as regarded those persons who had been clients of the plaintiff during the time in which the plaintiff was serving his articles with him, and that the court considered that as regards persons who became clients of the plaintiff after the defendant had quitted his employment, the covenant would have been bad. That exactly applies to the present case. Whatever may be the true construction of the agreement — whether it extended or not to persons who might become customers of the plaintiff Baines or his successors after defendant had quitted his employment — it would at any rate be good as regards persons who became customers while the defendant was in that employment; I must therefore grant an injunction, but limited to restraining the defendant from serving or interfering with any persons who were customers of the plaintiff Baines at any time during the defendant's employment by him."

DAVENPORT V. CITY OF RICHMOND.

(21 Va. 693.)

Municipal corporation — ordinance as to keeping gunpowder.

An ordinance requiring the removal of powder magazines from a city is valid, although the city had sold the sites to the owners for the purpose of erecting such magazines.

CONVICTION of violation of ordinance forbidding the keeping of powder. The city council had conveyed to the defendant's grantors the premises in question, near the outskirts of the city, "to be used by them as a powder magazine, subject to such regulations relative to the storage, receipt, delivery and transportation of powder as the council may prescribe." A subsequent ordinance declared the said magazines dangerous to life and property and directed them "to be removed at the expense of the owners, to some more remote locality."

James N. Dunlop, for plaintiff in error.

C. V. Meredith, for defendant in error.

LEWIS, P. It is contended that the ordinance complained of is unconstitutional and void; first, because it impairs vested rights of the defendants under a previous valid contract with the city council; and second, because it takes the property of the defendant without compensation.

Upon the principles recognized by this court in *R. F. and P. R. Co. v. City of Richmond*, 26 Gratt. 83, we are of opinion that this position is not well taken. In other words, that the withdrawal of the privilege previously granted to the defendants — to erect and maintain a powder magazine within the city limits — was the valid exercise of the police power with which, to that extent, the city is invested by the legislature, and with reference to which the privilege was granted and accepted. And hence the inconvenience of which the defendants complain is *damnum absque injuria*.

However difficult it may be, if it is possible at all, to exactly define the limits of that power, there is no doubt that it extends to the protection of the lives, health, morals and safety of all persons in the community, and that it cannot, by contract or other-

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wise, be parted with by a municipal corporation to which it may be delegated. This question was very fully discussed by Judge CHRISTIAN in delivering the opinion of the court in the case just mentioned. There the validity of an ordinance forbidding the railroad company to propel its engines and cars by steam on Broad street in this city, was assailed by the company on the ground that it violated the contract rights of the company under its charter and the previous action of the city council. But the ordinance was held to be valid.

It may be, said the court, that the company is the loser by the ordinance in question, but upon well-established principles it has no claim for compensation because there has been no appropriation of its property, but only the regulation of the mode in which its chartered rights are to be exercised. It was also said that every person holds his property subject to the limitation expressed by the maxim, *sic utere tuo ut alienum non lœdas*, exercised either by the legislature directly or by public corporations to which the legislature may delegate it. That all laws and ordinances relating to the safety, comfort, health and general welfare of the inhabitants, commonly called police laws and regulations, are not invalid though they disturb the enjoyment of individual rights, and make no provision for compensation for such disturbances. That the power to restrain a private injurious use of property is very different from the eminent domain. That under the latter compensation must always be made. But under the former it is not a taking of private property for public use, but the salutary restraint of a noxious use by the owner contrary to the maxim above referred to. And among the familiar examples of the exercise of this power by all well-ordered governments, the court mentioned laws and ordinances prohibiting the storage of gunpowder in populous places, the use of buildings as hospitals for contagious diseases, the carrying on of noxious or offensive trades, and the like.

Dissatisfied with the judgment of this court, the company took the case on a writ of error to the Supreme Court of the United States, and there the judgment was affirmed.

In the opinion of the latter court it was held: 1. That the ordinance did not impair the rights of the company under its charter; 2. That it did not deprive the company of its property without due process of law; and, 3. That it did not deny to the company the equal protection of the laws.

"The power to govern," said the court, "implies the power to ordain and establish suitable police regulations," and "it is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end, if we find that it exists." And further it was said, that "appropriate regulation of the use of property is not the 'taking' of property within the constitutional prohibition." *Railroad Co. v. Richmond*, 96 U. S. 521.

In *Presbyterian Church v. Mayor, etc., of New York*, 5 Cow. 538, an action was brought for an alleged breach of covenant for quiet enjoyment in a deed executed by the defendants conveying certain land, for a valuable consideration, for the purpose of a church and cemetery. The plaintiffs averred performance on their part of the conditions of the deed, and that the covenant had been broken by the defendants by reason of their by-law, passed many years after the execution of the deed, prohibiting the further use of the premises as a cemetery. Judgment however was rendered for the city, the court holding that the by-law in question was not a breach, but a repeal of the covenant in the deed, and that a municipal corporation cannot, by contract, abridge its legislative powers.

The principle upon which the case was decided is so clearly expressed by the court that we quote from its opinion the following extract: "The defendants," it was said, "are a corporation. * * * They are considered a person in law within the scope of their corporate powers, and are subject to the same liabilities, and entitled to the same remedies for the violation of contracts as natural persons. They are also clothed with legislative powers, and in the capacity of a local legislature are particularly charged with the care of public morals and the public health within their own jurisdiction.

"In ascertaining their rights and liabilities as a corporation, or as an individual, we must not consider their legislative character. They had no power, as a party, to make a contract which should control or embarrass their legislative powers and duties. Their enactments in their legislative capacity are to have the same effect upon their individual acts as upon those of any other persons, or the public at large, and no other effect.

"The liability of the defendants therefore upon the covenant in question must be the same as if it had been entered into by an individual, and the effect of the by-law upon it the same as if that by-law had been an act of the State legislature. It is expressly

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authorized by the legislature, and whether it be their act or an act of the local legislature makes no difference."

In the subsequent case of *Coates v. Mayor, etc., of New York*, 7 Cow. 585, it was held in respect to the same by-law, that it was not unconstitutional, either as impairing the obligation of contracts or taking private property for public use without just compensation; but that it was clearly valid as a police regulation in respect to nuisances. And it was also held that a by-law, which is otherwise valid, need not recite on its face that it is necessary, but that such necessity is implied by the act of passing it. "It is of the nature of legislative bodies," said the court, "to judge of the exigency upon which their laws are founded; and when they speak, their judgment is implied in the law itself. It is sufficient therefore to set it forth in pleading. This is equivalent to an averment that the exigency has arisen, been adjudicated and acted upon. All to be shown beyond this is matter by which the court may see that the law operates upon the subject of the power. The implied adjudication is then taken as conclusive."

In *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191, the court, speaking of the police power, says: "As a general proposition, it may be stated, it is the province of the law-making power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is a judicial question." See also *Matter of Application of Jacobs*, 98 N. Y. 98; s. c., 50 Am. Rep. 636.

The same principle was acted upon in *City of Salem v. Eastern R. Co.*, 98 Mass. 431, wherein certain proceedings of the board of health of the city were objected to, because they had been taken without previous notice to the parties affected thereby. But the objection was not sustained. See also *Foot v. Fire Department, etc.*, 5 Hill, 99; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Slaughter-House Cases*, 16 Wall. 36; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Justice v. Commonwealth*, 81 Va. 209.

These principles apply to and are decisive of the present case. It is needless therefore to inquire whether a powder magazine in a populous part of a city, is at common law a nuisance *per se*, though there are authorities which hold that it is. 1 Russ. Crimes, 321; *Cheatham v. Shearon*, 1 Swan, 213; s. c., 55 Am. Dec. 734. It is sufficient to say that the storage of gunpowder in a city or town being

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attended with danger, its regulation is a matter within the power of the corporate authorities, and consequently the judgment of the city council as expressed in the ordinance requiring the removal of the magazines in question, is conclusive upon the courts.

The Hustings Court therefore did not err in instructing the jury that "the fact that the city of Richmond, in 1866, sold to the defendants, or to those under whom they claim title, the site of the powder magazines now ordered by the council to be removed, for the purpose or with the knowledge that the same was to be used for the erection of powder magazines, does not prevent the city council from passing the ordinance of August 17, 1882, if, in the judgment of that body, the safety or convenience of the people demands the removal of said magazines."

It was also contended, in the argument for the city, that the power conferred upon the corporation by its charter to "provide suitable magazines in or near the city for the storage of gunpowder or other combustible and dangerous articles," cannot be delegated by the city to others, and therefore that the original grant of the privilege to the defendants was *ultra vires* and void. But as what has already been said sufficiently disposes of the case, it is unnecessary to pass upon that question. The judgment is affirmed.

Judgment affirmed.

FAUNTLEROY and RICHARDSON, JJ., dissented.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

WEBB V. LAIRD.

(59 Vt. MS.)

Water and water-course — common dam — duty to maintain — damages.

Where two mill-owners on the same stream, one below the other, have a mutual interest in the dam propelling both mills, they are, in the absence of contract, under a mutual duty to maintain it, and liable to contribute thereto in proportion to their respective interests, and the lower owner is not entitled to damages for the upper owner's unnecessary delay in repairing the dam.

BILL for injunction against tearing away a flume, etc. The opinion states the facts.

George W. Wing, for orator.

S. C. Shurtleff, for defendant.

Ross, J. Wesley C. Peck formerly owned the mills, and all the water power, rights and privileges in the stream, now in contention between the orator and defendant. These consist, among other things, of a grist-mill and saw-mill. The grist-mill is located further down the stream, and has a small dam and pond for turning the water of the stream upon the wheel, but not of a capacity to accumulate any considerable water more than what flows in the stream. The stream is small, and only in time of high water furnishes sufficient running water to propel the machinery in either mill. The

saw-mill, located a few rods above the grist-mill, has a dam and pond capable of storing a very considerable quantity of water. To operate the grist-mill, when the water flowing in the stream was insufficient for that purpose, Mr. Peck arranged to draw water from the pond at the saw-mill into the stream through a waste-gate in the saw-mill flume, when the water otherwise flowing in the stream was insufficient to propel the grist-mill. When the saw-mill was running the water used ordinarily furnished a supply to the stream for operating the grist-mill, and if a full supply was not thus furnished, he drew also through the waste-gate. While owning and thus using the properties now owned by the orator and defendant, Mr. Peck conveyed the grist-mill to the orator, and in the conveyance granted the privilege of drawing water from the saw-mill pond in the following language: "And also the privilege of drawing water at all times from the pond through the waste-gate of the saw-mill flume situated on the stream above, * * * sufficient for doing all the grinding that may become necessary or called for by the public at said grist-mill as heretofore." The parties are in substantial accord in regard to the quantity of water which the orator is entitled to draw, and in regard to the manner in which it is to be drawn.

They differ with reference to the extent of the orator's rights, and with reference to the duty of the orator to contribute toward the maintenance of the dam at the saw-mill. The orator contends that he has the right to draw the water only as an easement, and that it is the duty of the defendant, who has become the owner of the saw-mill and privilege, to maintain the dam and secure to him the privilege of drawing the water at all times at his own expense. There is no contract between the parties, or the defendant's grantor and the orator, in regard to maintaining the dam. The defendant contends, there being no contract imposing the duty upon him to maintain the dam at the saw-mill privilege, that he can abandon or give up the use of the water power created by the dam and allow the dam to waste and perish; that the privilege granted is more than the mere right to draw the water, that it confers whatever is necessary to make the privilege available, a right to maintain the dam and pond, and have the water of the stream stored in the pond for his use. By whatever name the orator's water privilege may be designated, in the absence of a contract to that effect, we do not think the defendant is under any legal obligation to maintain the dam and pond for the sole use

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of the orator; nor is the orator under any obligation to maintain, or help to maintain them for the sole use of the defendant. Either party may withdraw from the use of the water power created by the dam and pond, and be under no duty to the other to contribute to the maintenance of the dam and pond. In such case the other party has the right to maintain the dam and pond to preserve the power for his own use. The orator's privilege conferred by the deed would be very limited and comparatively worthless if he could not maintain the dam and pond when the defendant should withdraw from using the water power; and for that reason be under no necessity to maintain it. He is under no contract liability, express or implied, to maintain it for the sole use of the orator. This court has heretofore placed a similar construction on a reservation of analogous water rights. In *Hill v. Shorey*, 42 Vt. 614, the orator conveyed a tract of land on which there was a dwelling-house and a spring of water, with an aqueduct conveying the water from the spring to a tub near the house. In the deed he reserved the right to take the waste water from the tub to an adjoining tract of land. It was held that the reservation gave him an interest in the spring of water, with the right to maintain the aqueduct from the spring to the tub, if the grantee did not. We think the principles of that decision sound and applicable to the present case. Applying them, the orator, by the privilege of drawing water from the waste-gate of the flume from the dam of the saw-mill pond, acquired an interest in the water power created by the dam and pond, such an interest that he has the right to maintain that power at his own expense if the owner of the saw-mill privilege abandons it.

Neither the orator nor the defendant being under any contract obligation to maintain the water power for the exclusive benefit of the other, either can abandon it, and be under no obligation to aid in its maintenance. Each having an interest in the water power, and the right to maintain it if the other abandons it, it follows that they have a mutual interest in, and are under a mutual duty to maintain it so long as each continues to exercise his right to it. While enjoying this mutual interest under the mutual duty, equity will compel each to contribute toward its maintenance, according to his relative right and interest; and if he refuses thus to contribute, equity will enjoin him from using the power.

This holding necessitates a further reference under the cross-bill to determine the relative right of each party to the water power

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created by the saw-mill dam and pond, and an apportionment of the expenses properly incurred in its maintenance. This holding that the defendant was under no legal obligation to maintain the water power for the sole benefit of the orator to draw from, establishes that the orator has no right to the five dollars, found by the master, as damages occasioned by the delay of the defendant in completing necessary repairs in the fall of 1882, inasmuch as it was the right and duty of the orator to have made the repairs equally with the defendant; and if the defendant did not proceed with sufficient rapidity to suit his convenience, he could have made them himself. The solicitors substantially agree that the relative rights of the parties to the use of the water power created by the saw-mill dam is to be determined as they were in use at the date of the contract and conveyance from Peck to the orator.

[Omitting minor question.]

On these views the decree dismissing the orator's bill was correct, and would be affirmed if it were not for the cross-bill, which it was agreed the defendant might file. The hearing in this court has proceeded as though the cross-bill were filed. To furnish the proper relief in the cross-bill further proceedings in the Court of Chancery are necessary; and the cause is remanded with a mandate settling the rights and duties of the parties in accordance with the views already expressed.

Cause remanded.

BLAINE V. CURTIS.

(89 Vt. 120.)

Usury — penalties — action for, in another State.

Penalties imposed by the usury laws of one State are not recoverable in another.*

ACTION for penalty. The opinion states the case. The judgment below was for defendant.

Roswell Farnham, for plaintiff.

John H. Watson, for defendant.

* See *McCarthy v. Lavasche* (89 Ill. 270), 31 Am. Rep. 88, and note, 88.

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WALKER, J. The case comes before us upon general demurrer to the declaration; and the only question to be decided is whether the forfeiture imposed by the laws of New Hampshire upon a person receiving interest at a higher rate than six per cent may be enforced by an action of debt, in favor of the person aggrieved, in this State.

The provisions of the statute, which are substantially set out in the declaration, are as follows:

"If any person, upon any contract, receives interest at a higher rate than six per cent, he shall forfeit three times the sum so received in excess of said six per cent to the person aggrieved, who will sue therefor."

It is alleged in substance, in the declaration, that the defendant, at Piermont, in the State of New Hampshire, received upon a promissory note for the sum of \$1,500, then held by the defendant, and owing by the plaintiff to her \$30 interest in excess of six per cent from the plaintiff on the 1st day of May in each year for six years, beginning with May, 1876, and ending with May, 1882, making \$180 — thus received by the defendant of the plaintiff in excess of six per cent interest during the years named; it is also alleged that by virtue of the statute of New Hampshire aforesaid, an action hath accrued to the plaintiff to recover of the defendant three times the excess of six per cent interest so paid.

The case stated comes within the statute declared upon; and if the suit had been instituted in New Hampshire, there could be no doubt of the right of the plaintiff to recover, if the action is not barred in that State by the statute of limitations.

The question here is, can the liability imposed by the statute be enforced out of the limits of New Hampshire? This must depend on the nature of the liability and the manner in which it is created. It is not a responsibility *ex contractu*. And the question arises, is it a liability imposed by the statute upon a person receiving illegal interest for a violation of its provisions and penal in its nature, or is it a statute declaratory of a common-law right and a means or way enacted for enforcing it, and therefore remedial in its nature?

If it only gave a remedy for an injury against the person by whom it is committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury sustained, it would fall within the class of remedial statutes. 1 Bl. Com. 86; 1 B. & P. N. R. 179,

180; 2 T. R. 154 and 155, note; 3 Saund. 376, note 7; 1 Salk. 206; *Boice v. Gibbons*, 8 N. J. L. 324; *Burnett v. Ward*, 42 Vt. 80. But this statute does not limit the recovery to the mere amount of the loss sustained, or to cumulative damages as compensation; it goes beyond and inflicts a punishment upon the offender. It makes the taking of illegal interest an offense, and prescribes a penalty of three times the amount of illegal interest taken. The right of action under it does not arise out of any privity existing between the person paying and the person receiving the illegal interest, but is derived entirely from the statute. The action given is not to recover back money that the person receiving had no lawful right to take and hold against the person paying it, but one to recover a penalty for a breach of a statute law and founded entirely upon the statute imposing the forfeiture. It was held in *Hubbel v. Gale*, 3 Vt. 266, that whatever may be the form of the action, if it is founded entirely upon a statute and the object of it is to recover a penalty or forfeiture, it is a penal action. We think the liability created by the statute declared upon is clearly a statutory one imposed upon the person receiving illegal interest as a wrong-doer, and penal in its nature. This view is supported by the decisions of many courts of last resort, some of which have been cited in the argument. We refer however only to a decision of the Supreme Court of the United States in a case analogous to the case at bar. The provisions of the act in question are similar to the provisions of the National Currency Act of Congress, approved June 3, 1864, which provides that if unlawful interest is received by any banking association created by it, the person or persons paying the same, or their legal representatives, may recover back in an action of debt twice the amount of interest thus paid from the association taking or receiving the same. This provision of the Currency Act referred to came up for consideration by the Supreme Court of the United States in the case of *Barnet v. Nat. Bank*, 98 U. S. 555, where the plaintiff in error sought to avail himself of the benefit of the act in his defense by way of offset and counterclaim to the bill of exchange on which the suit was brought. Justice SWAYNE, in delivering the opinion of the court, denied the relief sought and said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved, or his legal representative, must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes

the redress. The suit must be brought especially to recover the penalty where the sole question is the guilt or innocence of the accused."

This statute has been repeatedly under consideration by the Supreme Court of the State of New Hampshire, and has been by that court invariably treated as a penal statute. *Harper v. Bowman*, 3 N. H. 489, was an action to recover a forfeiture of three times the illegal interest paid. It was objected that some part of the penalty was barred by the statute of limitations, and the court, in considering the question held, that the act limiting suits on penal statutes, which provides that actions upon any penal statute shall be brought within one year from the time of committing the offense, was controlling in the decision of the question raised.

In *Kempton v. Savings Institution*, 53 N. H. 581, the court treated the statute as a penal one in an able opinion upon its construction and rules of pleading applicable to actions brought upon it.

This construction which has been given to the statute by the Supreme Court of the State in which it was enacted, treating and holding it a penal statute, should be followed, and is controlling in courts of this State. *Hunt v. Hunt*, 72 N. Y. 217; s. c., 28 Am. Rep. 129; *Leonard v. Steam Navigation Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491.

It is well settled that no State will enforce penalties imposed by the laws of another State. Such laws are universally considered as having no extra-territorial operation or effect, whether the penalty be to the public or to persons. They are strictly local, and effect nothing more than they can reach within the limits of the State in which they were enacted. They cannot be enforced in the courts of another State either by force of the statute or upon the principles of State comity. Story Conf. Laws, §§ 620, 621; Rorer Inter-State Law, 148, 165; *Ogden v. Folliot*, 3 T. R. 733; *Scoville v. Canfield*, 14 Johns. 338; s. c., 7 Am. Dec. 467; *First Natl. Bank of Plymouth v. Price*, 33 Md. 487; *Derrickson v. Smith*, 27 N. J. L. 166; *Barnes v. Whitaker*, 22 Ill. 606; *Sherman v. Gassett*, 9 Ill. 521; *Henry v. Sargeant*, 13 N. H. 321; s. c., 40 Am. Dec. 146; *Slack v. Gibbs*, 14 Vt. 357.

Actions for the recovery of a penalty or forfeiture given by laws of one State upon usurious contracts made and entered into in such State will not lie in another State. Such laws are held to be penal in their nature, and governed by the general rule that they have no

extra-territorial force, and can be enforced only by the courts of the State in which they are enacted. *Rorer Inter-State Law*, 165; *Barnes v. Whitaker*, 22 Ill. 606; *Sherman v. Gassett*, 9 Ill. 521.

The judgment of the County Court sustaining the demurrer and adjudging the declaration insufficient was correct, and is affirmed.

Judgment affirmed.

STATE V. GOSS.

(39 Vt. 102.)

Criminal law — delivering intoxicating liquors — express agent — knowledge.

An express agent delivered a C. O. D. package containing lager beer to the consignee, who paid him a sum of money to be transmitted to the consignor, and the agent was criminally prosecuted for selling, furnishing and giving away intoxicating liquor without authority. On trial the court instructed the jury that it was immaterial whether he knew what the package contained or not. *Held*, that an express carrier, in the absence of suspicious appearances or circumstances, is neither presumed to know nor authorized to find out, as a condition of receiving it, what a package contains that is offered for carriage, and the agent was not liable.

CONVICTION of illegal sale of intoxicating liquors. The opinion states the case.

L. P. Poland, for respondent.

M. Montgomery, State's attorney, and *H. C. Ide*, for State.

ROWELL, J. This is a complaint in one count for selling, furnishing, and giving away intoxicating liquor contrary to law.

The facts are these: In the summer of 1883, one Pearson, who lived at East Barnet, ordered some lager beer from Bellows Falls, to be sent to him by express, and it came in a box directed to him and marked C. O. D. The respondent was station agent, and also agent of the express company at East Barnet, and as such express agent delivered said box and its contents to Pearson, and received from him the designated price of \$1.75 for transmission to the consignor. The respondent had no knowledge of what the box contained; but the State claimed that from the form and size of the box, and the price paid, he had reason to suspect that it contained lager beer, and that he could have found out by opening the box.

In March, 1884, a box came by express to East Barnet from Manchester, N. H., marked C. O. D., and directed to Wm. Lowell of South Danville, which is seven or eight miles from East Barnet. The respondent, as express agent, delivered this box to one Badger, the driver of a daily stage between the two places, to be carried to Lowell; and Badger then, or in a day or two after, paid the respondent the charges thereon, of about \$3.50, with money furnished him by Lowell for that purpose; but the respondent did not know whether it was Lowell's or Badger's money. Before Badger started for South Danville that day the box was seized by an officer and he arrested, and on opening the box it was found to contain a gallon of alcohol in a jug. There was no evidence that the respondent knew what the box contained, except that the testimony tended to show that there was such a perceptible odor of liquor emitted from it that he had reason to suspect that it contained liquor, and he admitted that he did so suspect.

The respondent claimed, and requested the court to charge, that as he was an express agent, and his only connection with the matter was in that capacity, his acts were not in violation of law, unless the person to whom he delivered the boxes obtained the beer and the alcohol for the purpose of disposing of it contrary to law, and that if he knew what the boxes contained it could make no difference; that he could not in any event be made liable unless it was found that he knew what they contained; that delivering them to the persons named, and receiving and remitting the money to the consignors, did not constitute a sale by him for which he could be held liable; and that delivering the box to Badger was only a delivery to another carrier, and not a sale nor a furnishing.

The court ruled that it was immaterial whether the respondent knew what the boxes contained or not, and that upon the facts proved, which were not disputed, the respondent was guilty of two illegal sales, and so instructed the jury, which returned a verdict accordingly.

It is undoubtedly true, as contended, that the respondent did not so become the seller of these packages as to make him civilly liable as such. But this does not settle the question; for one may well be criminally liable in respect of a transaction in which he engages as agent although he is not civilly liable.

A distinction is attempted to be made between the respondent's relation to the alcohol and his relation the beer; but none exists,

we think. It does not appear that the express company had undertaken to deliver the alcohol beyond the terminus of its own transit at East Barnet, nor that according to the rules and usages of the business, it was its duty to deliver the package to the stage-driver for further transit, nor that the driver was an express carrier, and so the company must be taken to have been the ultimate and not an intermediate carrier; and when the stage-driver came with money furnished to him by the consignee for that purpose, and took and paid for the package, he was acting, and seems to have been regarded as acting, for and on behalf of the consignee, and a delivery to him in the circumstances was a delivery to the consignee.

Now, applying the doctrine of *State v. O'Neil*, 58 Vt. 140, s. c., 56 Am. Rep. 557, which seems to have received very general approval everywhere, here were certainly two illegal sales at Barnet, for which the consignors might legally be indicted and convicted. But when the packages came into the hands of the respondent, no crimes had been committed by any one in respect of illegal sales, for no sales had then been made; the transactions thus far constituted only executory contracts of sales in Bellows Falls and Manchester respectively; the completed sales—the things that constituted the offenses—remained to be perfected, and this was done by the respondent. Thus the consignors themselves have committed no crimes by way of illegal sales except by the hand of the respondent, who, having done the essential acts that constitute the crimes, is responsible on general principles unless the circumstances shield him.

In *Commonwealth v. Whalen*, 16 Gray, 25, a wife was convicted as a common seller on proof that in the absence of her husband she had delivered and taken pay for liquors that he had previously bargained and sold. The court said that a delivery is an essential part of a sale, and that if she acted as the agent of her husband in what she knew to be illegal sales, by making delivery in his absence, it was such a participation in the misdemeanor as to make her responsible.

But do the circumstances shield the respondent? He says they do, because he says it was his duty to deliver the packages as he did, even though he had known their contents, and that he should have been liable had he not delivered them; while, on the other hand, it is said that he was bound to know their contents at his peril, and that his want of knowledge makes no difference.

Both of these propositions are untenable. As to the first, although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not bound to transport and deliver intoxicating liquor nor other commodities if thereby they would commit an offense or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity, to make themselves agents for others to break the laws of the State.

As to the other proposition, express carriers are not bound, as a general thing, to know the contents of packages offered to them for carriage. If they were, it would follow that they might refuse to carry without such knowledge; and as it would be unreasonable to require them to accept as conclusive the word of the shipper as to contents, they must have a right to inspect for themselves as a condition of carrying, which would occasion great inconvenience in practice. But no such right exists as a general rule.

This precise question was passed upon by the Supreme Court of the United States in the *Nitro-Glycerine Case*, 15 Wall. 524, where the rule is laid down thus: "It not, then, being his (the carrier's) duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicion as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged, as matter of law, with notice of the properties and character of packages thus received."

In *Crouch v. London and North Western Ry. Co.*, 14 C. B. 254, it is said that the proposition that a carrier has in all cases a right to be informed as to the contents of packages brought to him, and may refuse to carry them if the information is withheld, has not a shadow of authority to sustain it except a *dictum* of BEST, C. J., in *Riley v. Horne*, 5 Bing. 217, and that in its generality it cannot stand the test of reasoning. But this case recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain any thing of a dangerous character; and it is said in the *Nitro-Glycerine Case*, that it is only when such ground exists, arising from the appearance of the package or other circumstances tending to excite suspicion, that the carrier is authorized, in the absence of special legislation on the subject, to require

knowledge of the contents of the packages offered as a condition of receiving them for carriage.

In England, railway carriers are authorized by statute to refuse to take any parcel that they suspect to contain goods of a dangerous nature, or to require the same to be opened to ascertain the fact.

In *Brass v. Maitland*, 6 E. & B. 471, which holds it to be the duty of the shipper, when he offers goods of a dangerous character to be carried, to give notice of their character, the chief justice said: "It would be strange to suppose that the master or the mate, having no reason to suspect that goods offered for general shipment might not be safely stowed away in the hold, must ask every shipper the contents of every package." 1 Smith Lead. Cas. (7th Am. ed.) 389, 411.

If, then, in the absence of suspicious appearances or circumstances, an express carrier is neither bound to know nor authorized to find out, as a condition of receiving it, what a package contains that is offered to him for carriage, it would be strange to hold him guilty of a criminal offense because of the character of its contents; for in such case he is bound to carry, and liable if he does not, and the law will not compel a man to act and then punish him for acting. Hence, the turning point of this case is, whether the respondent had reason to believe or suspect—for it appears that he did not know—that these packages contained what they did. If he did, he is charged with notice of their contents, and is guilty; if he did not, he is not charged with such notice, and is not guilty; and as the evidence tended to show he did, and the court ruled the point immaterial, the case must go back for a new trial.

Exceptions sustained and cause remanded for a new trial.

Exceptions sustained and cause remanded.

STATE V. STEWART.

(59 Vt. 273.)

Criminal law — conspiracy — boycotting.

If two or more persons combine to prevent, by violence and intimidation, an employer from retaining or employing certain persons, or employees from entering into his service, it is a criminal conspiracy at common law. The indictment need not set forth the means, nor the defendants' guilty knowledge. (*See note, p. 720.*)

DEMURRER to indictment overruled and motion to quash denied below. The opinion sufficiently states the case.

Bates & May, for respondents.

M. Montgomery, State's attorney, *H. C. Ide* and *Alex. Dunnett*, for State.

POWERS, J. Although authorities can be found that lay down the rule that felonies and misdemeanors, or different felonies, cannot be joined in the same indictment, still the rule in this and most of the States is otherwise.

It is always and everywhere permissible for the pleader to set forth the offense he seeks to prosecute in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. If the counts cover the same transaction, though involving offenses of different grade, the court has it in its power to preserve all rights of defense intact. *Commonwealth v. McLaughlin*, 12 Cush. 612; *State v. Lincoln*, 49 N. H. 464; *State v. Smalley*, 50 Vt. 736; *State v. Thornton*, 56 Vt. 35; *Rex v. Ferguson*, 2 Stark. 489. Moreover, the motion to quash is addressed to the discretion of the court, and its refusal is not the subject of revision here. *Commonwealth v. Eastman*, 1 Cush. 189; s. c., 48 Am. Dec. 596; *Commonwealth v. Ryan*, 9 Gray, 137; 1 Whart. Cr. Law, § 519.

The respondents' counsel argues that the first and second counts do not cover the offense of criminal conspiracy at common law. But we think upon a careful examination of the English and American cases cited in argument, and we suspect that none have been overlooked on either side, that it is clear to a demonstration that a combination of the character set forth in these counts was a conspiracy at the common law; and further, that the subject-matter of the offense being the same in this country as in England, namely: an interference with the property rights of third persons, and a restraint upon the lawful prosecution of their industries as well as an unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such persons as they please, the common law of England is "applicable to our local situation and circumstances," in this behalf, and is therefore the common law of Vermont.

In England and here, it is lawful, and it may be added, commendable, for any body of men to associate themselves together for the purpose of bettering their condition in any respect, financial or social. The very genius of free institutions invites them to higher levels and better fortunes. They may dictate their own wages, fraternize with their own associates, choose their own employers, and serve man and mammon according to the dictates of their own conscience.

But while the law accords this liberty to one, it accords a like liberty to every other one; and all are bound to so use and enjoy their own liberties and privileges as not to interfere with those of their neighbors.

All the legislation in England and America has been progressively in the direction of according to laborers the enjoyment of equal rights with others.

The early English statutes, beginning with the middle of the fourteenth century are to be read in the light of the civilization of that day, and their provisions, to us of the nineteenth century, harsh, illiberal and tyrannical, were but the reflex of the prevalent notions of class distinctions, that shaped and guided the social and political polity of those days.

From time to time however down to 1875, this legislation has been liberalized and christianized; and to-day in England, as here, workmen stand upon the same broad level of equality before the law with all other vocations, professions or callings whatsoever, respecting the disposition of their labor and the advancement of their associated interests.

There, as here, it is unlawful for employers wrongfully to coerce, intimidate or hinder the free choice of workmen in the disposal of their time and talents. There, as here, it is unlawful for workmen wrongfully to coerce, intimidate or hinder employers in the selection of such workmen as they choose to employ. There, as here, no employer can say to a workman he must not work for another employer, nor can a workman say to an employer he cannot employ the service of another workman.

By the law of the land these respondents have the most unqualified right to work for whom they please, and at such prices as they please. By the law of the land, O'Rourke and Goodfellow have the same right. By the same law, the Ryegate Granite Company has the right to employ the respondents or O'Rourke on such terms as

may be mutually agreed upon, without let, hindrance or dictation from any man or body of men whatever.

Suppose the members of a bar association in Caledonia county should combine and declare that the respondents should employ no attorney, not a member of such association, to assist them in their defense in this case, under the penalty of being dubbed a "scab," and having his name paraded in the public press as unworthy of recognition among his brethren, and himself brought into hatred, envy and contempt, would the respondents look upon this as an innocent intermeddling with their rights under the law? The proposition has only to be stated to disclose its utter inconsistency with every principle of justice that permeates the law under which we live.

If such conspiracies are to be tolerated as innocent, then every farmer in Vermont, now resting in the confidence that he may employ such assistance in carrying on his farm as he thinks he can afford to hire, is exposed to the operation of some secret code of law, in the framing of which he had no voice, and upon the terms of which he had no veto, and every manufacturer is handicapped by a system that portends certain destruction to his industry. If our agricultural and manufacturing industries are sleeping upon the fires of a volcano, liable to eruption at any moment, it is high time our people knew it.

But happily such is not the law, and among English-speaking people never has been the law. The reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute; or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal, whether they promote objects or adopt means that are *per se* indictable; or promote objects or adopt means that are *per se* oppressive, immoral or wrongfully prejudicial to the rights of others.

If they seek to restrain trade, or tend to the destruction of the material prosperity of the country, they work injury to the whole public.

These propositions are the clear deduction of the cases cited in argument, and breathe a spirit of equality and justice that must commend itself to every intelligent mind.

Counsel have cited to us no case in which it has been ruled that this crime of conspiracy does not exist at the common law. We are referred to Mr. Wright's clever monograph upon criminal conspiracies, wherein the author, though not denying that conspiracies to injure industries and against the free exercise of one's calling according to his own choice, were held to be criminal at the common law, still attempts to throw doubt upon the basis upon which the doctrine rests.

But when in 1 Hawkins' Pleas of the Crown, chap. 27, § 2 (a book of great authority; 2 Russ. Crimes, 674), it is laid down "that all conspiracies whatever, wrongfully to prejudice a third person, are highly criminal at common law;" and in 2 Whart's Crim. Law, § 2322, it is said that "a combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief;" and the same proposition, in one form of expression and another, is laid down in 2 Bish. Crim. Law, § 172; and in Desty Crim. Law, § 11; and in 3 Chitty Crim. Law, 1138; and in Archbold Crim. Prac. & Pl. 1830; and it was said by DENMAN, C. J., in *Queen v. Kenrick*, 5 Q. B. Div. 49: "It was contended, in the first place, that the third count was bad by reason of uncertainty, as giving no notice of the offense charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question; for we have sufficient proof that during that period any combination to prejudice another unlawfully has been considered as constituting the offense so called. The offense has been held to consist in the conspiracy, and not in the acts committed for carrying it into effect; and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose;" and Baron ROLFE, in *Reg. v. Selsby*, 5 Cox Crim. Cas. 495; and TINDAL, C. J., in *Reg. v. Harris*, 1 Car. & Marsh. 661; and CROMPTON, J., in *Hilton v. Eckersley*, 6 E. & B. 47; and GROVE, J., in *Rex v. Mawbey*, 6 T. R. 619; and Lord MANSFIELD, in *Rex v. Eccles*, 1 Leach Crown Cas. 274; and HILL, J., in *Walsby v. Anley*, 3 E. & E. 516; and CAMPBELL, C. J., in *Reg. v. Rowlands*, 17 Adol. & El. 670; and Baron BRAMWELL, in *Reg. v. Drutt*, 10 Cox Crim. Cas. 592; and BRETT, J., in *Reg. v. Bunn*, 12 Cox Crim. Cas. 316; and MALINS, V. C., in *Springhead Co. v. Riley*,

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L. R., 6 Eq. 551; and COLERIDGE, C. J., in *Mogul S. N. Co. v. McGregor*, L. R., 15 Q. B. Div. 476; and SHAW, C. J., in *Commonwealth v. Hunt*, 4 Metc. 111, 128; and CATON, C. J., in *Smith v. People*, 25 Ill. 17; and GIBSON, C. J., in *Commonwealth v. Carlisle*, Jour. Juris. 225; and CHAPMAN, C. J., in *Carew v. Rutherford*, 106 Mass. 1, have all added their indorsement of the doctrine advanced as early as the work of Hawkins, *supra*; it is manifest that we are compelled to forsake the literature of doubt, and to cleave unto that of authority. See also *Rex v. Ferguson*, 2 Starkie N. P. 489; *Rex v. Bykerdike*, 1 M. & Rob. 179; *People v. Fisher*, 14 Wend. 9; *State v. Donaldson*, 32 N. J. L. 151; *Snow v. Wheeler*, 113 Mass. 186; *State v. Noyes*, 25 Vt. 415; *State v. Burnham*, 15 N. H. 396; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173; s. c., 8 Am. Rep. 159.

Vice-Chancellor MALINS, in the case cited *supra*, states the law of the subject in brief but intelligible words: "Every man is at liberty to enter into a combination to keep up the price of wages; but if he enters into a combination for the object of interfering with the perfect freedom of action of another man, it is an offense, not only at common law but under act 6 Geo. IV, chap. 129."

The principle upon which the cases, English and American, proceed, is, that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The

good order, peace and general prosperity of the State are directly involved in the question.

In the case at bar, the third and fourth counts set forth more particularly the methods adopted by the respondents to interfere with the prosecution of its business by the Ryegate Granite Works. They charge the respondents with an intent to prevent the prosecution of the work of that company by threatening O'Rourke, Goodfellow and others; that the Ryegate Granite Works were "scab shops" and all workmen therein were "scabs," and their names would be published in the "scab" list in the Granite Cutters' Journal, and that they would be shunned and not allowed to work with other granite cutters, and would be disgraced in the craft, etc.; by all which O'Rourke, Goodfellow and others were frightened and driven away from said shops.

The exposure of a legitimate business to the control of an association that can order away its employees and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice, and with every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidation is to establish over labor, and over all industries, a control that is unknown to the law, and that is exerted by a secret association of conspirators, that is actuated solely by personal considerations, and whose plans, carried into execution, usually result in violence and the destruction of property.

That evils exist in the relations of capital and labor, and that workmen have grievances that oftentimes call for relief, are facts that observing men cannot deny. With such questions we, as a court, have no function to discharge further than to say that the remedy cannot be found in the boycott.

But it is objected that the first and second counts are defective in form.

In the first count the pleader charges an unlawful combination, conspiracy, confederacy and agreement to prevent, hinder and deter, by violence, threats and intimidation, the Ryegate Granite Works from retaining and taking into its employ O'Rourke, Goodfellow and others.

In the second count, after stating a malicious intent to control, injure, terrify and impoverish the Granite Company, he charges an

unlawful conspiracy, combination, confederacy and agreement to terrify, frighten, alarm, intimidate and drive away, by threats and intimidation, O'Rourke, etc., who were then and there workmen and laborers of the Granite Works.

Both counts charge an unlawful conspiracy; and both set forth the means by which the conspiracy is to be carried into effect. The unlawful conspiracy is enough without the statement of the means to show an offense at the common law. A conspiracy to hinder, prevent and deter a man from retaining and taking into his employ an attorney to defend his cause is a clear violation of his as well as the attorney's personal rights; and equally so is a combination to terrify, alarm and drive away his attorney already employed. The natural tendency and inevitable consequence of such combinations is to restrain the prosecution of legitimate callings and industries, and thereby injure the public as well as individuals. The coercive intent, emphasized and expanded by the aggregation of numbers, and amounting to a show of force, gives to such combination its character of illegality.

If in fact the respondents had prevented, hindered and deterred the Granite Works from employing O'Rourke, the act would confessedly have been criminal. It logically follows that a conspiracy to do this thing would be equally so.

It is not necessary to aver that the Granite Works desired or intended to employ O'Rourke. An allegation that it was in fact prevented from employing him *ex vi termini* implies a purpose to employ him which has been met and thwarted. So an allegation that the respondents conspired to hinder and prevent such employment imports an intent to interfere with the execution of a purpose already resolved upon. But the pleader has supplemented the charge of unlawful conspiracy by an allegation of the means by which it is to be accomplished; namely, by violence, threats and intimidation. Our statute, §§ 4226, 4227, R. L., has prescribed a punishment for using threats or intimidation to prevent a person from accepting or continuing an employment in a mill, etc.

These counts then charge a conspiracy to do an act unlawful at common law, by means unlawful under the statute.

In such case, it is not necessary to set out specifically the kind of threats or methods of intimidation made use of. The words of the statute may be used without setting forth their meaning. Thus in *Reg. v. Rowlands*, 17 Ad. & El. (N. S.) 671, the indictment

among other things charged a conspiracy to force workmen to quit the employment of Messrs. Perry by using threats and intimidation. The statute, 6 Geo. IV, chap. 129, § 3, forbids the use of such means. The court said: "It is objected that some counts do not disclose the nature of the molestation or intimidation by which the conspiracy was to take effect; but this is quite unnecessary. The words of the legislature are used; the terms in question have a meaning stamped upon them by the act, 6 Geo. IV, chap. 129, § 3, and we must take it that they are used here in that sense. And they are not employed as describing the substantive offense for which the indictment is preferred; that offense consists in the conspiracy, which is a misdemeanor at common law."

In *Commonwealth v. Dyer*, 128 Mass. 70, under a statute similar to ours, a like decision was made; and such is the general rule in criminal pleading, even when the statutory terms create the offense. 1 Whart. Crim. Law, § 364; *State v. Cook*, 38 Vt. 437.

Here the conspiracy is the complete criminal act. It was wholly unnecessary to aver the means by which the conspiracy was to be carried out. *State v. Noyes*, 25 Vt. 415, 422. Herein lies the distinction between this case and *Commonwealth v. Hunt*, 4 Metc. 111, relied upon by the respondents. In that case the substantive offense was a conspiracy, but not to do an unlawful act; and the means laid for its accomplishment were laid as mere matters of aggravation, so no crime whatever was charged in the indictment.

If the means to be used are not necessarily unlawful, either by statute or the common law, and are laid as the *corpus delicti*, then the rule contended for by the respondents applies; and a particular statement of the means to be used must be set out, so that the court can see on the face of the indictment that a crime has been committed. In *State v. Keach*, 40 Vt. 113, this court laid down the rule as follows: "The adjudged cases uniformly recognize the rule that a general allegation that two or more persons conspire to effect an object criminal in itself, as to commit a misdemeanor or felony, is sufficient, even though the indictment omits all charges of the particular means to be used; and the cases are now equally uniform in holding that if the agreement or combination be to do an act or to effect an object not criminal, by the use of unlawful means, a general charge of a conspiracy to effect the object is not sufficient; and the charge of such a conspiracy must be accompanied with a particular statement of the means by which the object of the con-

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spiracy was to be effected, so that those means may appear to be criminal, or the indictment will be bad."

These counts are drawn in accordance with approved precedents — 2 Whart. Prac. 657, 666; Bish. Forms, §§ 303, 304 — and are, we think, sufficient without the supplementary averment of the means to be used; and *a fortiori* a count charging a conspiracy to do an unlawful act by unlawful means must be held sufficient.

Much that has already been said applies to the third and fourth counts.

We think they sufficiently set out an offense under section 4227, R. L. The language of the statute is adopted, all the elements of the offense clearly enumerated, and the whole charged to have been done with the intent specified. This is sufficient. *Commonwealth v. Dyer, supra*; *Reg. v. Rowlands, supra*; *State v. Jones*, 33 Vt. 443; *State v. Cook*, 38 Vt. 437; 1 Whart. Crim. Law, § 364.

It was unnecessary to aver knowledge in the respondents of the wrongful character of the matters and things charged against them. If an act in its natural characteristics and quality is unlawful, knowledge of its wrongful character is presumed. It is otherwise when it becomes wrongful by the presence of accidental or fortuitous features not ordinarily attendant upon it. Thus in *State v. Carpenter*, 54 Vt. 551, cited by respondents, the respondent was presumed to know that it was unlawful to assault Larose as an individual. So for such assault no averment was necessary to bring home to him knowledge of the wrongful quality of his act. But when the same act was enlarged to the grade of an offense for impeding Larose as a public officer, it took on a character so abnormal that knowledge of this artificial quality of his act in the respondent must be alleged in order to lay a basis for a guilty intent.

We do not deem it necessary to extend this discussion — already too long drawn out — in following *seriatim* the numerous objections taken in the able and elaborate brief of the respondents to the different counts of this indictment. The general scope of the views expressed covers the whole ground, we think; and the result is, the judgment of the County Court overruling the motion to quash and overruling the demurrer, and adjudging the indictment to be sufficient, is affirmed; and the cause is remanded, to be further proceeded with.

Judgment affirmed and cause remanded.

NOTE BY THE REPORTER. — In *Old Dominion Steamship Company v. McKenna*, U. S. Cir. Ct., S. D. of N. Y., it was held that interference with the lawful business of an employer, whose workmen are engaged upon just and satisfactory wages, by procuring them to quit work in a body, if committed by persons not in the employ of the same employer, and for the purpose of injuring his business until he shall accede to demands he is under no obligation to grant, is actionable. So is declaring and attempting to enforce a boycott for the purpose of coercing compliance with such demands. BROWN, J., said: "I have carefully considered the elaborate arguments of counsel and examined the numerous authorities referred to. For lack of time I can only state my conclusions:

"1. All the material averments are either stated positively, or the source of information is sufficiently indicated.

"2. The facts stated in the complaint and affidavit constitute a legal cause of action against all the defendants for the actual damages suffered for the following reasons:

"(a) The plaintiff was engaged in the legal calling of common carrier, owning vessels, lighters and other crafts used in its business, in the employment of which numerous workmen were necessary, who as the complaint avers were employed 'upon terms as to wages which were just and satisfactory.'

"(b) The defendants not being in the plaintiff's employ, and without any legal justification, so far as appears — a mere dispute about wages, the merits of which are not stated, not being a legal justification — procured plaintiff's workmen in this city and in southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendants' demands, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work, being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable.

"(c) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business and attempted to prevent the plaintiff from carrying on any business as common carrier, or from using or employing its vessels, lighters, etc., in that business, and endeavored to stop all the dealings of other persons with the plaintiff by sending threatening notices or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it through threats of loss and expense in case they dealt with plaintiff by receiving, storing or transmitting its goods or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such intimidations, and refused to perform existing contracts and withheld their former customary business, greatly to the plaintiff's damage.

"(d) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law as well as by section 168 of the Penal Code of this State.

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"(e) Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working or in obtaining work because they are not members, or in order to induce them to become members, or designed to prevent employers from making a just discrimination between the wages paid to the skillful and to the unskillful, to the diligent and to the lazy, to the efficient and to the inefficient, and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means and accompanied by damage are actionable. See *Greenhood Pub. Policy*, 648, 653; *People v. Fisher*, 14 Wend. 1; *Tareton v. McGallister*, Peake. *105; *Rafael v. Verelst*, 2 W. Bl. 1055; *Lumley v. Gye*, 2 El. & B. 216; *Bowen v. Hall*, 2 Q. B. Div. 333, 337; *Gregory v. Duke Co.*, 6 M. & G. 205; *Gunther v. Astor*, 4 T. B. Monr. 12; *Reg. v. Rollins*, 17 Ad. & El. (N. S.) 671; *Mogul Co. v. Macgregor*, 15 Q. B. Div. 476; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1; *State v. Donaldson*, 82 N. J. Law, 151; *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1, 18; *Johnson v. Meinhardt*, 61 How. Pr. 168; *Slaughter-House Cases*, 16 Wall. 86, 116.

"8. There is no such doubt concerning the plaintiff's legal right as should debar it from the usual remedy. The motion to discharge from arrest is therefore denied."

In *State v. Glidden*, Sup. Ct. of Conn., April 1, 1887, it was held that a "boycott," as that term is used by organizations or laboring men in this country, is a conspiracy at common law, and the means by which it is in general sought to be accomplished are not only unlawful, but in some degree criminal. CARPENTER, J., said [omitting some immaterial matter]: "We will next inquire what is a criminal conspiracy. We will not attempt to formulate in a single sentence a definition which will embrace every case of conspiracy which the law will regard as criminal. Such a definition will of necessity embrace not only a great variety of subjects, but also many distinct and independent classes of subjects. We shall therefore have a better understanding of the matter if we consider each part of such definition by itself, each part having reference to a class of objects or purposes which may form the subject of a conspiracy. In the first place it seems to be generally conceded that if two or more persons confederate and agree together to commit some crime or misdemeanor, such confederation or agreement is itself an offense. Here we are hardly on debatable ground and here we will pause and apply this partial definition to this information. A statute passed in 1878 provides that 'every person who shall threaten to use any means to intimidate any person, to compel such person against his will to do, or abstain from doing, any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his

property with intent to intimidate him shall, upon conviction, be liable to a fine not exceeding \$100 or imprisonment in the county jail six months.' This statute is unquestionably designed as a substitute for the act of 1877, which doubtless had its origin in the apprehension which prevailed throughout the country at the time of and soon after the trouble on the Pennsylvania railroad, during which there was such an immense destruction of property at Pittsburgh. The operation of that act was limited to railroad, gas and telegraph companies. The act of 1878 removed the limitation and was designed to protect all persons, natural or artificial, employers or employees, in the management and control of their own business. It simply extended the remedy. We cannot therefore limit the act of 1878 to subjects embraced in the act of 1877 without doing violence to the manifest intention of the legislature. Do the acts which it is alleged the defendants conspired to do fall within the prohibition of the act of 1878? They propose to threaten and use means (the boycott) to intimidate the Carrington Publishing Company, to compel it, against its will, to abstain from doing an act (to keep in its employ the workmen of its choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing. There can be but one answer to the question. The acts proposed are clearly prohibited by the statute. We might perhaps stop here, but the arguments of the case took a much wider range, and the case itself will justify, and the times in which we live seem to require a more extended examination of the subject. Conspiracies against the government and conspiracies to hinder or obstruct the administration of justice, which are also regarded as criminal conspiracies, need not be considered in this case. It has often been said that a conspiracy to effect an unlawful purpose, or a lawful purpose by unlawful means, is an offense. But this is said to be a limitation rather than a definition. It certainly lacks definition. Many acts are said to be unlawful which would not be the subject of a criminal conspiracy. Other acts are unlawful because they are in violation of the criminal law or of some penal statute. If the end or means are criminal in themselves, or contrary to some penal statute, the conspiracy is clearly an offense. Between these two extremes a great variety of cases may arise, many of which ought not to be regarded as criminal. Suppose two or more boys, for instance, agree to go upon another's land; the proposed act is, or may be, a trespass and therefore unlawful. If they do not go no harm is done; if they do go they are, or may be liable civilly; but no one would seriously contend that in either case they would be liable criminally for the conspiracy. But suppose two or more conspire unjustly and wrongfully to deprive another of his liberty or property. Then, as we shall hereafter see, the criminal law may take cognizance of the act. Of course it is difficult, if not impossible, to define accurately and clearly in advance what would and what would not be an offense. Hence the difficulty of regulating by statute in all cases the law of criminal conspiracy. But this difficulty is not confined to these cases. There are other offenses at common law that are not defined by any statute. * * * Now if we look at this transaction as it appears in the face of this information, we shall be satisfied that the defendants' purpose was to deprive the Carrington Publishing

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Company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendant. The motive was a selfish one, to gain an advantage unjustly and at the expense of others, and therefore the act was legally corrupt. As a means of accomplishing the purpose the parties intended to harm the Carrington Publishing Company, and therefore it was malicious. It seems strange in a country in which law interferes so little with the liberty of the individual, that it should be necessary to announce from the bench that every man may carry on his business as he pleases, may do what he will with his own so long as he does nothing unlawful and acts with due regard to the rights of others, and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of citizens, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little, if any better than force, the action of employers. The defendants and their associates said to the Carrington Publishing Company: 'You shall discharge the men you have in your employ and shall hereafter employ only such men as we shall name. It is true we have no interest in your business, we have no capital invested therein, we are in no wise responsible for its success, and we do not participate in its profits, yet we have a right to control its management and compel you to submit to our direction.' The bare assertion of such a right is startling. The two alleged rights cannot co-exist; one or the other must yield. If the defendants have the right which they claim, then all business enterprises are alike subject to their direction. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance, whether law and justice will protect the business, or brute force regardless of law will control it, for it must be remembered that the exercise of the power, if conceded, will by no means be confined to the manner of employing help. Upon the same principle and for the same reason the right to determine what business others shall engage in, when and where it shall be carried on, etc., etc., etc., will be demanded and must be conceded. The principle, if it once obtains a foothold, is aggressive and is not easily checked. It thrives on what it feeds and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more. Business men have a general understanding of their rights under the law, and have some degree of confidence that the government through its courts will be able to protect those rights. This confidence is the corner stone of the whole business, but if their rights are such only as a secret and irresponsible organization is willing to concede to them, and will receive only such protection as such an organization is willing to give, where is that confidence which is essential to the prosperity of the country?

"Again, if the alleged right is conceded to the defendants, a similar right must be conceded to the promoters of the Carrington Publishing Company, and

those with whom they may associate. Otherwise all men are not equal before the law. It logically follows that they in turn may control the business matters of the defendants, may determine what trade or occupation they may follow, whether to work in this establishment or in that or in none at all. Obviously such conflicting claims in the absence of law can lead to but one result and that will be determined by brute force. It would be an instance of the survival not necessarily of the fittest but of the strongest. That would be subversive not only of all business but also of law and of the government itself. The end would be anarchy, pure and simple. Once more. Suppose the government should assert the right in the same manner to regulate and control the business affairs of the Carrington Publishing Company and other business enterprises, how long would the people submit to it? And yet the exercise of such a power by government would be far more tolerable than its exercise would be by secret organizations, however wise and intelligent such organization may be, for government is established by the people and is responsible to all the people. If it abuses its power the people have the remedy in their own hands, but if a secret organization, in the management of which the people at large have no voice, has no power and is not amenable to law, where is the remedy? It is further alleged that another purpose of the defendants was to injure and oppress John E. Skinner and seven other workmen of the Carrington Publishing Company by depriving them of their employment. What we have already said applies equally well to this purpose of the defendants. The workmen named have just as good a right to work for the corporation as the defendants have, and their right is entitled to the same consideration and the same protection. Then there are these further considerations. It is a combination, not against capital, nor employers, but against fellow workmen — men whose earnings are comparatively small, and who presumably used all their earnings for the support of themselves and their families. They are ordinarily poor men and men whose entire capital consists in their trade and time. It is proposed wantonly to deprive them of a livelihood and practically of all means of support. If a capitalist is driven from his business he has other resources, but the poor mechanic, driven from his employment, and, as is often the case, deprived of employment elsewhere, is compelled to see his loved ones suffer or depend upon charity. It is also a combination of many to impoverish and oppress a few. The weaker party needs and must receive the protection of the law. If in any case it is criminal for many to combine to do what any one may lawfully do singly, it would seem that this would be such a case. Numbers can accomplish what one man cannot, evil as well as good, and that is the reason of the combination. The law encourages combination for good, and combinations by workmen to better their condition by legitimate and fair means are commendable and should be encouraged. But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal and cannot be regarded with favor by the courts. But combinations for good purposes may be perverted, and when their power is sought to be used to harm their fellow men, to deprive others of their just rights, then, not the combination, but the use of it becomes criminal. In such use there is a large element of wantonness and malice. Any

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one man, or any one of several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose the combination is formidable. Its power for evil increases as its number increases. No one can drive these workmen from their situations. Numbers, if allowed their will, may do it. The intention by one man so long as he does nothing is not a crime of which the law will take cognizance of, and so too of any number of men acting separately. But when several men form the intent and come together and agree to carry it into execution the case is changed. The agreement is a step in the direction of accomplishing the purpose. The combination becomes dangerous and subverts the rights of others, and the law wisely says it is a crime. It is no answer to say the conspiracy was for a lawful purpose, to better their own condition, to fix and advance their rate of wages and further their own material interests. It is certainly true that they had a right to such a purpose, and to use all lawful means to carry it into effect; and so a purpose to acquire property is lawful so far as it contemplates lawful means only. But if it contemplates the accumulation of money by means of murder, theft, fraud, or injustice, the end does not sanctify the means. Neither will these defendants be permitted to advance their material interests or otherwise better their condition by any such reprehensible means. They had a right to ask the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper arguments in support of their request. But they had not the right to say 'you shall do this or we will ruin your business.' Much less had they a right to ruin its business. In such a case the direct and primary object must be regarded as the destruction of the business. The fact that it is designed as a means to an end, and that end in itself considered a lawful one, does not divest the transaction of its criminality. * * * We will also notice that it is alleged that the conspiracy contemplated boycotting as a means to the end sought. That word is not easily defined. It is frequently spoken of as passive only, a let alone policy, a withdrawal of all business relations, intercourse and fellowship. If that is its only meaning it will be difficult to find any thing in it criminal. We may gather some idea of its real meaning however by a reference to the circumstances in which the word originated. Those circumstances are narrated by Mr. Justin H. McCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority. In his work entitled 'England Under Gladstone' he says: 'The strike was supported by a form of action or rather inaction which so became historical. Captain Boycott was an Englishman, an agent of Lord Erne, and a farmer of Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Erne's tenants, and the tenantry suddenly retaliated in a most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles round resolved not to have any thing to do with him, and as far as they could prevent, not to allow any one else to have any thing to do with him. His life appeared to be in danger; he had to claim police protection. His servants fled from him as servants flee from their masters in some plague stricken Italian city. The awful sentence of excommuni-

cation could hardly have rendered him more helplessly alone for a time; no one would supply him with food. He and his wife had to work in their own fields themselves in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim oclayon on their deserted fields with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground; and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvests were brought in and his potatoes dug by armed Ulster laborers guarded always by a little army.'

"If this is a correct picture, the thing we call a boycott originally signified violence if not murder. If the defendants in their handbills and circulars used the word in its original sense, in its application to the Carrington Publishing Company, there can be no doubt of their criminal intent. We prefer however to believe they used it in a modified sense. As an importation from a foreign country, we may presume that they intended it in a milder sense — in a sense adapted to the laws, institutions and temper of our people. In that sense it may not have been criminal. But even here, if it means, as some high in the confidence of trades union assert, absolute ruin to the business of the person boycotted, unless he yields, then it is criminal. Instances are not wanting where the boycott has been attended with more or less violence, and it cannot be denied that the natural tendency is, especially when applied by the ignorant and vicious, to attempt to make it successful by force. It too often leads to serious disturbances of the peace and even murder. We are loath however, to assume that these defendants intended any such consequences. Nevertheless it is a dangerous instrumentality to use, and if those instigating and resorting to it do not of their own accord take notice of its peril and voluntarily abandon its use, as we sincerely hope they will, the courts will be called upon to recognize its dangerous tendency and treat it accordingly.

"From these considerations it is apparent that the purpose of this conspiracy, or the means by which it was to be accomplished, or both, were not only unlawful, but as some authorities express it, 'in some degree criminal.'"

We avail ourselves of Mr. Clarence A. Seward's brief in *Old Dominion Steamship Co. v. McKenna*, *supra*, to give a summary of the adjudications on the point in question:

"An action in the nature of a conspiracy is given by the common law if the plaintiff has sustained special damage. *Saddle v. Roberts*, 1 Ld. Raym. 378.

"A leading case upon such a cause of action is that of *Gregory v. Duke of Brunswick*, 6 M. & G. 205, which was an action on the case for conspiracy to prevent the plaintiff, who was an actor, from acquiring fame and profit, and for hiring persons to hoot and groan and yell at the plaintiff during the performance, and for hooting, hissing and yelling at him, and in which the defendant pleaded specially; and the court held their principal plea insufficient, and gave judgment for the plaintiff.

"The principle of this case was confirmed in *Buffalo Lubricating Oil Co. v. Eberst*, 30 Hun, 588, in which the court said: 'Any unlawful act done with

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a view of injuring another in his reputation, business or property, is actionable if damage results therefrom.' And that a conspiracy 'consists in the unlawful combination or agreement of two or more persons to do an unlawful act in itself, or to do a lawful act by unlawful means.' In *Carew v. Rutherford*, 106 Mass. 1, 10, CHAPMAN, C. J., said: 'If the wrongful acts done are tortious, whether criminal or not, the persons who are guilty of the tortious acts will be civilly liable to those whom they have injured; if the defendants have injured the plaintiff unlawfully the articles of association cannot protect them.'

* * * 'One of the aims of the common law has always been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others; and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege which he has. Many illustrations of this doctrine are given in Bac. Ab., Action on the Case, F., among which are the following: 'If A., being a mason, and using to sell stones, is possessed of a certain stone-pit, and B., intending to discredit it and deprive him of the profits of the said mine, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working and others from buying, A. shall have an action upon the case against B., for the profit of his mine is thereby impaired.' So 'if a man menaces my tenants at will of life and member, *per quod*, they depart from their tenures, an action upon the case lies against him.' 'If a man discharges guns near my decoy-pond with design to damnify me by frightening away the wild fowl resorting thereto, and the wild fowl are thereby frightened away, and I am damnified, an action on the case lies against him.' Slander as to one's profession or title is a wrong of a similar character. The illustrations given in former times relate to such methods of doing injury to others as were then practiced, and to the kinds of remedy then existing. But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges, and existing forms of remedy must be used.'

"In *Walker v. Cronin*, 107 Mass. 502, the court states the general principle taken from Comyn's Digest as follows: 'In all cases where a man has a temporal loss or damage by the wrong of another he may have an action upon the case, to be repaired in damages.' And it therefore held that an action of tort might be maintained upon a count which alleged that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully, and without justifiable cause, molest him in the carrying on of the said business with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and the profits of those which he would have derived therefrom, and was put to great expense to procure other suitable workmen, and compelled to pay larger prices for work than he would have had to pay but for the said doings of the defendants, and was otherwise injured in his business.

"In *Gunther v. Astor*, 4 T. B. Monr. 13, an action was maintained for enticing away workmen from their employment for a pianoforte manufacturer. They were not hired for any limited time, but worked by the piece. The discussion indicates that damages were considered to be recoverable for the breaking up or disturbance of the business of the plaintiff; whereby he suffered the loss of his usual profits for a long period. The grounds of damages were apparently regarded as altogether independent of the mere loss of any contracts with the workmen.

"In *Bowen v. Hall*, 6 Q. B. Div. 333, it was stated that an action would lie against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause an injury to such employer.

"Where two or more persons unite or combine for the express purpose of doing an injury to a man's trade, business or calling, their joint conduct is a tort in the nature of a conspiracy, and is actionable as such. It has been expressly held that such combinations as are alleged in the complaint and affidavits are illegal and wrongful conspiracies, for which, if damage results, an action will lie.

"In *People v. Fisher*, 14 Wend. 10; s. c., 28 Am. Dec. 501, a conspiracy of journeymen workmen, of any trade or handicraft, to raise their wages by entering into combinations to coerce journeymen of master workmen employed in the same trade or business, to conform to rules established by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, was indictable as a misdemeanor.

"In the *Master Stevedores' Association v. Walsh*, 2 Daly, 1, 3, it was said: 'It has frequently been held that combinations to prevent a journeyman from working below certain rates or to prevent master workmen from employing one except at certain rates are unlawful. * * * Parties engaged in such combination may be indicted for conspiracy. * * * Several convictions in this country have been in cases where coercive measures were resorted to, either to prevent master workmen from employing journeymen except at certain rates, or to intimidate journeymen from engaging below certain rates, or to compel them to become members of the combination. Every man has the right to fix the price of his own labor, to work for whom he pleases, and for any sum he thinks proper; and every master workman has equally the right to determine for himself whom he will employ, and what wages he will pay. Any attempt by force, threat, intimidation or other coercive means to control a man in the fair and lawful exercise of these rights is therefore an act of oppression, and any combination for such a purpose is a conspiracy.'

"In *Johnston Co. v. Meinhardt*, 9 Abb. N. C. 363; 24 Hun, 489; 60 How. Pr. 168, the court said, when referring to chapter 19 of the Laws of 1870, that 'this statute does not permit an association, or trades union, so called, or any body of men in the aggregate, to do any act which each one of such persons, in his individual capacity and acting independently, had not a right to do before the act was passed. This act does not shield a person from liability for his action in intimidating or coercing a fellow laborer so that he shall leave his employer's service. Such conduct is in its nature a trespass upon the rights

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of business of the employer. If he compels by assaults or violence, by threats, by acts of coercion, a fellow-craftsman to leave the employment of another he commits an offense against the rights of such persons which is hardly distinguishable from an act which could itself injure or destroy the product of a man's labor. It is a direct injury to property rights, and may be regarded as the sole proximate cause of such injury. * * * It is the duty of courts to hold alike the employer and the employed for the payment of damages for any violation of contract, and to a responsibility for any acts which immediately and in a legal sense affect the rights of the other.'

"In *State v. Donaldson*, 82 N. J. L. 151, it was held that it was an indictable conspiracy for several employees to combine and notify their employer that unless he discharges certain enumerated persons, they will in a body quit his employment, the court saying that the alleged aim of the combination was unlawful, the effort being to dictate to the employer whom he should discharge from his employment, and that this was an unwarrantable interference with the conduct of his business.

"In *Bisby v. Dunlap*, 56 N. H. 456; s. c., 23 Am. Rep. 475, it was held that when the relation of master and servant exists by virtue of a valid contract, the master may maintain an action on the case against any person who knowingly and willfully induces the servant to break the contract and abandon the service. When the element of malice enters a case a more liberal rule of damages prevails, and the jury, taking into consideration all the circumstances of the wrong, ought to give as compensation what in their judgment it is reasonable that the plaintiff should receive and the defendant pay. Being intended as a compensation for a wrong, and not as a punishment for the violation of a criminal law, the damages are not open to the objection that they expose the defendant to a double punishment.

"In *Haskins v. Royter*, 70 N. C. 601; s. c., 16 Am. Rep. 780, it was held that any third person, who without lawful justification induces a party, who for a consideration has contracted to render personal service to another, to quit such service, and refuse to perform his part of the agreement, is liable to the parties injured in damages. That the consideration of the contract is too small, or its terms not honorable, will not justify a court, for the benefit of a third person and not a party thereto, in setting such contract aside.

"In *Jones v. Jeter*, 48 Ga. 881, it was held that where one man employs a laborer to work on his farm, and another man, knowing of such contract of employment, entices and hires or persuades the laborer to leave the services of his first employer during the term for which he was so employed, the law gives to the party injured the right of action to recover damages.

"In *Dixon v. Dixon*, 83 La. Ann. 1261, the defendants were held liable in damages to the plaintiff for having, by threats, persuasion and otherwise, induced the laborers on the latter's plantation to abandon their work and violate their contract of employment, by which fact the plantation was left uncultivated.

"Boycotting, as such, is actionable if private and particular damage is shown. *Mogul Steamship Co. v. Macgregor*, 15 Q. B. Div. 476.

"In *Baughman v. Richmond Typographical Union*, Richmond, Va., Circuit Court, February 8, 1887, an action on the case to recover \$30,000 damages for

boycotting the plaintiffs' business, Judge WELLFORD, among other things, said: 'As another ground of demurrer, it was suggested that the damages alleged to have been sustained were too remote and uncertain. This objection is clearly untenable. The declaration does not allege damage merely by the prevention of a probable future trade, but by the destruction of an existing profitable trade. There is no element of speculation or contingency involved in the present loss of a valuable patronage. The circular of the defendants addressed every customer as a patron, and clearly contemplated his withdrawal of his dealings with the plaintiffs as an immediate damage to their business. The declaration alleges such damage as the cause of action, and I think, if proven to the satisfaction of a jury, it is sufficient. I am therefore of opinion that the demurrer should be overruled.' In a criminal case against the committee of the same union, decided at the same time, Judge ATKINS says: 'It is contended by counsel for defense that the threats used by the conspirators in the case at bar are not illegal threats, and therefore the means by which the conspiracy is to be carried out are not unlawful. The threats in this case were that the conspirators would do all in their power to break up and destroy the business of the parties to whom the threats were addressed, unless they would do something which they had a lawful right not to do. Are those lawful threats? Has any man, or set of men, the legal right to say to an American citizen: Do as we dictate, or we will ruin you? The enjoyment of life and liberty with the means of acquiring and possessing property is one of the inherent rights guaranteed to every citizen of this Commonwealth by the bill of rights. The privileges cannot be taken away or abridged except in accordance with law. No class of men can take the law into their own hands. In this case the threat is to break up and destroy the business of the customers of Baughman Brothers. This is an illegal threat, because it is a threat to destroy a right guaranteed to them by the bill of rights. This is a threat to do an injury to a stranger unless he will do an injury to Baughman Brothers, against whom he has no cause of complaint. This is a threat to a party that unless he will co-operate with the conspirators and assist them to injure, ruin, break up and destroy the business of Baughman Brothers, that they will do all in their power to break up and destroy his business. Even though they meant that they would break up and destroy the business of the customers by competition, yet if those threats were intended and reasonably calculated to have the effect of intimidating or forcing the person to whom they were made into doing an act injurious to another, which it was his will and legal right not to do, they are unlawful.'

"In the case of *Payne v. Railroad Co.*, 18 Tenn. 521, it was held that 'if the defendants, by means of 'threats and intimidations,' have driven away plaintiff's customers, and thus destroyed his trade, they have injured him by an unlawful act, and are liable to him in damages, whether they did it wickedly and maliciously or not. For it is unlawful to threaten and intimidate one's customers; and the loss of trade is the natural and proximate result of such acts.'

"'Combinations of artisans for their common benefit, or for the development of skill in their trade, or to prevent overcrowding therein, or to encourage

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those belonging to their trade to enter their guild, or for the purpose of raising prices, are valid, provided no force or other unlawful means be employed to carry out their acts, or their objects be not to impoverish third persons, or to extort money from employers, or to encourage strikes or breaches of contract, or to restrict the freedom of members for the purpose of compelling employers to conform to their rules.' Greenhood on Public Policy, 648, citing authorities in support of these rules, and the language of EAST, J., in *Ridge v. Rollins*, 17 A. & E. (N. S.) 671, as follows: 'The rights of workmen are conceded, but the exercise of free will and freedom of action within the limits of the law is also secured equally to the masters.'

To Mr. Seward's authorities we may add *Mapstrick v. Ramge*, 9 Neb. 390; s. c., 81 Am. Rep. 415. The eighteen defendants, journeymen tailors, working for the plaintiff by the piece, by conspiracy stopped work simultaneously, and returned their work to the plaintiff unfinished, and worthless in that condition. The plaintiff was unable to get hands to finish it. *Held*, that an action for damage would lie. This is founded on *Jones v. Baker*, 7 Cow. 455. Compare *Heywood v. Tillson*, 75 Me. 225; s. c., 46 Am. Rep. 373.

There is a learned article on this topic in *The Journal of Jurisprudence and Scottish Law Magazine* for March, 1887.

See also a paper entitled, "Is Boycotting Criminal?" by Tracy C. Becker, New York State Bar Association Proceedings, vol. 10, p. 148.

ST. JOHNSBURY V. THOMPSON.

(59 Vt. 301.)

Municipal corporation — ordinance — victualling-shops.

Under a charter power to regulate victualling-houses, a village may impose a penalty of ten dollars for keeping one without a license.*

ACTION for penalty. The opinion states the case. The plaintiff had judgment below.

Bates & May, for defendant.

Ides & Stafford, for plaintiff.

WALKER, J. This is an action of debt to recover a penalty of \$10, imposed by a by-law of the village of St. Johnsbury, for

* See *Ex parte Canto* (21 Tex. Ct. App. 61), 57 Am. Rep. 609, and note, 611; *State v. Holcomb* (68 Iowa, 107), 56 Am. Rep. 853; *Ex parte Gregory* (20 Tex. Ct. App. 210), 54 Am. Rep. 516, and note, 523; *Launder v. City of Chicago* (111 Ill. 291), 53 Am. Rep. 625.

keeping a victualling-shop in that village without a license from the trustees. The County Court directed a verdict upon the evidence for the plaintiff, for \$10 and costs.

No question is made as to the organization of the village under the charter, nor as to the adoption of the by-law upon which the action is founded; but it is contended by the defendant that the by-law is invalid: (1) Because it is in conflict with the general law of the State, and, as he insists, not authorized by the village charter; (2) Because the by-law is in restraint of trade, and unreasonable and contrary to common right. The defendant also insists that the County Court was not warranted upon the evidence in directing a verdict for the plaintiff.

Taking up these objections in the order stated, the first question for consideration is, the validity of the by-law.

I. The general law of the State since 1850 has authorized the selectmen of towns to license for one year or less time suitable persons to keep victualling-houses or shops in their respective towns, and to sell therein provisions and fruits; and has clothed the selectmen with power to annul or vacate such licenses whenever in their opinion the public good requires it. The same statute law provides that any person keeping a victualling-house or shop, and selling therein provisions or fruits without a license, shall forfeit to the town, where such offense is committed, \$10. Comp. Stat., chap. 87, §§ 1, 7; Gen. Stat., chap. 95, §§ 1, 8; R. L., §§ 3940, 3947.

With this law in force, the village of St. Johnsbury was incorporated by an act of the legislature, approved November 23, 1852, and given power by its "by-laws to regulate * * * the construction, location and use of hay-scales, markets, slaughter-houses, groceries, victualling-shops and the erection of dwelling-houses and other buildings, so as best to provide for the safety of the village; to restrain nuisances," and to exercise other police powers therein stated; and given power to impose any fine not exceeding \$25 for the breach of any such by-law, to be recovered for the use of the corporation in an action of debt, etc. Sec. 7, Act of Incorporation.

Under this charter the village adopted by-law No. 3, authorizing its trustees to license for one year or less time any person to keep a grocery or victualling-shop, under such regulations as they may prescribe, within the limits of the village, to sell therein all kinds of provisions and fruits; and provided therein that, "If any person, without a license therefor, as provided in this article, shall

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hereafter keep any grocery or victualling-shop within the limits of the village, and shall sell therein or furnish any victuals or fruit, he shall forfeit and pay as a penalty to the corporation the sum of \$10 and costs for each offense, to be recovered in action of debt in the name of the corporation.

The general law and the by-law are alike in all their essential features. They require the same license and impose the same penalty. They cannot both stand together, for they give two municipal bodies conflicting powers over the same subject in the same territory. One must give way to the other. The by-laws of a municipal corporation when authorized by the charter, have the same effect within its limits, and with respect to persons upon whom they lawfully operate, that an act of the legislature has upon the people at large. 1 Dill. Mun. Corp., § 308, and cases therein cited. So if the by-law is authorized by the charter, it has the effect of a special law of the legislature within the limits of the village, and supersedes the general law upon the subject of victualling-houses therein; for the charter giving the village power to pass the by-law inconsistent with and repugnant to the general law, by necessary implication, operated to repeal the general law within the territorial limits of the village, on the principle that provisions of different statutes which are in conflict with each other cannot stand together; and in the absence of any thing showing a different intent on the part of the legislature, general legislation upon a particular subject must give way to later inconsistent special legislation on the same subject. 1 Dill. Mun. Corp., § 88; 4 Kent Com. 466, note; *In re Snell*, 58 Vt. 207; *State v. Morristown*, 33 N. J. L. 57; *State v. Clarke*, 22 N. J. L. 54; *Davies v. Fairbairn*, 3 How. 636; *In re Goddard*, 16 Pick. 504; *State v. Clarke*, 54 Mo. 17; *Mark v. State*, 97 N. Y. 572.

It follows that the validity of the by-law depends upon the power of the village under its charter to pass it, and upon whether it is a reasonable regulation of the business of victualling-houses, and not contrary to common right.

It is an undisputed proposition of law that a municipal corporation possesses and can exercise under its charter not only powers granted in express words, but also such powers as are necessarily and fairly implied in or are incident to the powers expressly granted, and such as are essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp., § 89.

The language of the charter relating to victualling-houses is: "Said corporation may by by-laws regulate * * * the construction, location and use of victualling-shops."

The legislature, by the language used, undertook to delegate to the village the general police power of the State over the construction, location and use of victualing-shops, as well as markets and slaughter-houses, etc. There is no language used in the act showing any intent on the part of the legislature to restrict the power given, nor to make it subject to the general law then in force in regard to the subjects named in the charter. By the charter, the subject-matter of the construction, location and use of victualling-shops within the limits of the village is left to the legislation of the village government. It throws upon the village authorities the responsibility of deciding what legislation in respect thereto will best promote the good order of the community and the safety, health and comfort of the inhabitants; and to that end it is competent for the village to enact all reasonable and needful by-laws. The intent of the act was to give the village greater power and control over victualling-shops than is given by the general law to selectmen of towns. The village part of St. Johnsbury had grown into a large village, and had become quite thickly settled, and there was necessity for its having larger police powers over victualling-shops than is required in a sparsely settled township. And that necessity, doubtless, largely induced the legislature to pass the act incorporating the village, establishing a more comprehensive system of government and control over victualling-shops, and the other subjects mentioned in the charter, than was given to towns by the general law. It gives the village power to legislate as to the construction and location of such shops, and also to the manner of their use and the right to use, and under what circumstances and rules that right shall be exercised. The provisions of the charter and the general law are radically inconsistent. A license granted by the selectmen would give the person holding the same the right to keep a victualing-shop of any construction and in any location in the village, and to keep it open at all hours of the day and night, unless it became a public nuisance, and thus render inoperative and ineffectual any by-law which the village government might adopt in reference to the construction, location and use of such shops. We cannot ascribe to the legislature an intention to establish two such conflicting and hostile systems of government upon the same subject, or to leave in

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force provisions of law by which its later will, as expressed in the charter, may be thwarted and overthrown. Such a result would subject legislation to reproach for its uncertainty and unintelligibility.

It is urged in the argument that the word "regulate," as used in the charter, did not authorize the village to enact a by-law requiring keepers of victualling-shops to be licensed.

It is not safe to found an argument on the use of a specific word, for the language of legislative enactments is not always precise and accurate. It is not the specific word used but the intent of the legislature, as shown by the whole enactment, that determines its meaning and the powers conferred upon it. It is apparent that the word "regulate," as employed in the act, has a general signification and applies to the right to use victualling-shops as well as to the manner of use, and implies the power of restriction and restraint. This word, as used in city charters, has been held as conferring the power to license.

The case of *State v. Clark*, 54 Mo. 17, relating to the social evil powers of the city of St. Louis, is an instructive case on the effect of a special act on a general law, and of the use and meaning of the word "regulate" in a charter. The defendant was indicted under the general criminal code of the State which prohibited the keeping of bawdy-houses. The defendant pleaded license from the city of St. Louis to keep such a house. The city charter gave the city power to pass ordinances not inconsistent with any law of the State, "to regulate or suppress" such houses. Under the power to "regulate," the city regulated such houses by passing an ordinance licensing them, and such an ordinance was held to be valid notwithstanding the general law, and to have the effect to prevent the enforcement of the general law of the State on that subject within the city of St. Louis.

It is plain that the purpose of the charter was, among other things, to give the village power to fix and determine the localities where victualling-shops may be erected; to permit their being kept only as the public good may require; to direct and control the mode and manner of using them; and to prohibit their continuance whenever and wherever they become sources of danger to the good order, safety, health and comfort of the community.

It is argued that this construction may result in a total prohibition of the business. This does not necessarily follow. That a power may be abused is no test of the existence of the power. We

are not to presume that the village will abuse the authority intrusted to it. It will be soon enough to deal with questions of that character when they arise. It is enough to say for the present that the by-law in question is fairly within the scope of the powers conferred by the charter. The regulation contemplated by it can be effected in no better way than by requiring keepers of such shops to be licensed, and by imposing a penalty upon them for keeping the same without a license.

II. It is next objected that the by-law is unreasonable and in restraint of trade.

The purpose of the ordinance is not to impose a tax or raise a revenue for municipal use, but to regulate the business of keeping victualling-shops. A police regulation relating to such shops could hardly be passed that would not have a partial operation. Every public regulation in a village or city necessarily in some sense restricts the absolute right that existed previously; but this is not considered an injury. The individuals thus restricted, as well as others, are supposed to be benefited. It is no objection to the validity of the by-law, because it is partial to some extent, provided it is only a proper restraint and regulation of the business for the good order, health and comfort of the community, and not a general restraint.

A by-law that no meat shall be sold in the village would be bad, being a general restraint; but a by-law that the same shall not be sold except in a particular place is valid, not being a restraint of the right to sell, but a regulation of that right. *Buffalo v. Webster*, 10 Wend. 99; *Pierce v. Bartrum*, Cowp. 269.

In *Nightingale's case*, 11 Pick. 168, a by-law of the city providing that no inhabitant of the city, or of any town in the vicinity thereof, shall, without the permission of the clerk of the market, be suffered to occupy any stand for the purpose of vending commodities in certain streets, which, by the law, are a part of the market, was held to be a salutary and valid police regulation, and not operating as an improper restraint of trade but a wholesome regulation of it.

In *Brooklyn v. Breslin*, 57 N. Y. 591, an ordinance of the city prohibiting cartmen from doing the business of a cartman without a license, was held to be not a general restraint of the business, but a proper and wholesome regulation of it, and not against common right.

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Ordinances of villages and cities, that none shall engage in the business of brokers or auctioneers unless licensed, have invariably been held to be reasonable and valid regulations of the business conducted by them, though the same necessarily restrain the individual rights of the people to some extent.

We have held that the act gave the village power to pass the by-law. The wisdom and expediency of granting such power were for the legislature to decide; and we think it cannot be said that the by-law is more than a proper regulation of that branch of business for the good order of the village and the health and comfort of its inhabitants, and a proper exercise of the police power delegated to the village by the legislature, and that it is not contrary to common right nor an improper restraint of trade.

Victualling-shops, as well as markets and slaughter-houses, are fairly within the police powers of the State. These powers, as described by Judge ISAAC F. REDFIELD in *Thorpe v. Railroad Co.*, 27 Vt. 149, extend "to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State, and by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State, of the perfect right to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

[Minor question omitted.]

Judgment affirmed.

ROBIE V. BRIGGS.

(59 Vt. 443.)

Statute of limitations — application of payments — individual and partnership debt.

When one owes another upon an individual and also upon a partnership account, and makes general payments without any application, without protestation against further liability, and the payments amount to more than the individual account, the law will apply the balance on the partnership account to remove the bar of the statute of limitations, although the creditor, without definite knowledge of the standing of the two accounts, gave the debtor credit for all the payments on his individual account.

APPPEAL from Probate Court. The opinion states the case.

Stephen E. Royce, for Briggs' estate.

Ballard & Burleson, and Cross & Start, for Horskins' estate.

WALKER, J. The foregoing cases stand upon the same facts as reported by the auditor, and the result reached in either case necessarily determines the other.

On the seventh day of October, 1882, J. W. Horskins held, as surviving partner of the firm of Horskins & Gates, a partnership account against E. D. Briggs, which accrued prior to the dissolution of that firm, January 1, 1866. This account had never been balanced, but on said seventh day of October it showed a balance against Briggs of \$593.05. No payment had been made thereon by Briggs since 1873, nor had it been otherwise acknowledged, and it was consequently then barred by the statute of limitations.

On the same seventh day of October Horskins also held an individual account against Briggs, independent of the partnership account, which contained their matters of deal from January, 1866, to 1882, and a balance of an old account that accrued prior to the partnership account, brought forward as the first item thereof, which on that day showed a balance against Briggs of \$54.78. This individual account, which contained a large amount of deal between the parties, had at all times during its existence shown a balance against Briggs varying from \$50 to \$500, but had never been examined and balanced.

With these two accounts standing as thus stated and without any examination of them, or any definite knowledge of their standing upon the books or of the balances against him upon either, but supposing that he was owing Horskins a considerable amount, Briggs made three cash payments to Horskins upon his indebtedness generally, without any directions as to their application, of the dates and amounts following, to-wit: October 7, 1882, \$100; January 24, 1884, \$46.86; March 14, 1884, \$53.14, aggregating \$200. All these payments were credited by Horskins without any examination or balancing of the books or definite knowledge of the standing of the two accounts in his individual account with Briggs. Soon after the last payment, and in April, 1884, Horskins died. Gates died in 1878, and Briggs after the commencement of his action against Horskins' estate.

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On balancing up the individual account after Horskins' death, it was ascertained that the \$100 payment made October 7, 1882, overpaid it \$45.22, and that when the last two payments were made there was nothing due from Briggs on the individual account, and that the three payments which Horskins had credited upon it overpaid the same \$145.22. Briggs thereupon presented a claim for this excess to the commissioners upon Horskins' estate, which passed to the County Court by appeal, and for this excess the administrator of Briggs seeks to recover in his action against Horskins' estate. On the other hand the administrator of Horskins, in his action against Briggs' estate, seeks to recover the unpaid balance of \$593.05 standing against Briggs in the partnership account, less the \$145.22 which he claims Briggs' estate cannot recover, because, as he contends, the three payments, of which the \$145.22 is a part, were made to apply on Briggs' indebtedness generally, and after the application of a sufficient amount thereof to extinguish the individual debt, the law applies the excess, as of the date of the several payments, upon the partnership debt, and thus removes the statute bar.

The question then for consideration is whether the \$45.22 paid in excess of the individual debt October 7, 1882, and the two payments made in 1884 after the individual account was extinguished, all being general payments without directions by the debtor as to their application, and credited by the creditor in the individual account without ascertaining how the two accounts stood, warrant the implication of a new promise to pay the partnership debt.

It has long been well settled that a part payment of a debt barred by the statute, if made without protestation against further liability, is a conclusive recognition and acknowledgment on the part of the debtor of such debt at the time of making it, from which the law implies an admission of the actual existence of the balance as a subsisting debt, notwithstanding the statute, and a promise to pay it, which prevents the operation of the statute.

It is also well settled that the debtor in making the payment where there are several demands against him may direct its application. He has the primary right to appropriate the payment to whatever debt he chooses, and his direction, when given in express terms, or when implied from the circumstances of the payment, must govern its application. But if no application is directed by the debtor, or implied from the circumstances of the payment, the

creditor may make it. If neither the debtor nor creditor make the application, the law will make such application of the money as may be just. The debtor's intention as to the appropriation may be said to govern. This intention, when no designation of demand is made by the debtor at the time of payment, is gathered from the circumstances of the transaction. If a general payment is made without direction to a creditor holding only one demand, the intention of the debtor is manifest.

When a voluntary payment is made by a debtor on his indebtedness generally to his creditor, holding two or more known demands against him, without direction as to its application, and not under circumstances clearly showing to which debt he intended the money to be appropriated, the law regards him as having waived his right in favor of the creditor, and as intending that the payment should be applied as part payment of such debt or debts, if more than sufficient to pay one, as the creditor may justly and reasonably elect to appropriate it to; and on the creditor's failure to make the appropriation, as intending such an application as the law upon the principles of equity will make. So that the application of a general payment, whether directed by the debtor, creditor or the law, may be said, in a legal sense, to be made in accordance with the debtor's intention; and such an application of a payment in either way will have effect to remove the statute bar from the debt or debts, if the payment is more than sufficient for one demand, upon which the payment is thus applied. This principle applies only to voluntary payments and payments authorized by the debtor. *Ayer v. Hawkins*, 19 Vt. 26; *Corliss v. Grow*, 58 Vt. 702; *Walker v. Butler*, 6 El. & Bl. 506.

Briggs knew of the existence of both debts. He made payments to Horskins upon both after the dissolution of the copartnership. He supposed he was owing Horskins a considerable amount, and on the day of Horskins' death spoke of paying \$100 more to him. With all this knowledge he made the payments in question upon his indebtedness generally, and waived the right of appropriation. There is no fact found which shows that Briggs intended to pay only the individual debt and not the partnership debt.

On the contrary, the auditor finds that there was nothing to show that he intended that the payments, or either of them, should be applied wholly upon either of the accounts to the exclusion of the other. He clearly did not intend them as loans or gifts. They

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were made and intended as part payments of a greater subsisting indebtedness, and must be so appropriated. The debtor's intention is controlling. There were only two debts to which the payments could be appropriated. Horskins applied them first to the extinguishment of the individual debt which was not barred by the statute. Of this Briggs could not complain, for it was most favorable to him. Horskins could legally appropriate to the individual debt only so much of the payments as was necessary for its extinguishment. When that debt was extinguished, the balance must be appropriated to the payment of the partnership debt, which was barred by the statute, as of the dates of the payments making up this balance. When so applied, whether by the creditor or the law, they have effect to take the debt out of the operation of the statute, because they were payments upon a general indebtedness, of which the partnership debt was a part, and after the extinguishment of the individual debt, the only remaining demand upon which they could be applied.

Payments must be applied according to the intention of the parties or the intention of the party paying, when that can be ascertained. It conclusively appears from the auditor's report that Briggs made the payments for the purpose of reducing his general indebtedness to Horskins, and that Horskins received the money with that understanding. And this purpose was not defeated by Horskins crediting in his individual account, without ascertaining the balance due thereon, the \$45.22, the excess of the October payment over the amount due on the individual account, and the two payments made after it was in fact extinguished. This erroneous entry did not appropriate the whole amount of the payments to the payment of the individual account. It appropriated only so much of the money as was necessary for the payment of the balance due thereon, and left the residue to be applied by the laws, which applies it as of the date of the payments upon the partnership debt, which was the only remaining demand in the hands of the creditor. This is not a change of appropriation made by the creditor, but an application of money paid on general indebtedness, and not appropriated by him.

With this application, the payments making up the \$145.22 were by implication payments upon the partnership debt as a larger subsisting debt, and an acknowledgment of the actual existence of the balance, from which the law implies a new promise, which prevents the operation of the statute.

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The right of Horskins' administrator to recover the balance found due on the partnership account is clear, if the payments removed the statute bar. As we hold that the payments removed the statute bar, the consequence is that the judgment of the County Court is reversed in both cases; and in the case of W. C. Robie, administrator of the estate of J. W. Horskins, *v. The Estate of E. D. Briggs*, judgment is rendered upon the auditor's report for the plaintiff to recover of the defendant \$447.83, and interest thereon since March 14, 1884, damages and costs. In the case of Chauncey Temple, administrator of E. D. Briggs' estate, *v. Estate of J. W. Horskins*, judgment is rendered upon the auditor's report for the defendant to recover costs. Both judgments are ordered to be certified to the Probate Court.

KOPPER V. DYER.

(50 Vt. 477.)

Mortgage — redemption — accident — relief from.

The mortgagor had taken means to obtain the money for redeeming the premises from foreclosure, which rendered it reasonably certain that he would succeed; but by reason of the failure of the party promising the money, to meet him at the appointed time, he was delayed until after banking hours, and was thereby prevented from sending the money to the clerk of the court in season for payment within the time limited by the decree. *Held*, an accident, and that the mortgagor was entitled to redeem.

BILL to redeem, etc. The opinion states the facts.

Stewart & Wilds, for defendant.

Ormsbee & Briggs, J. M. Slade and Noble & Smith, for the orator.

ROWELL, J. Kopper seeks relief on the ground of accident. That chancery may grant relief on that ground in cases of this kind cannot be doubted; and the first question that arises is, has the orator made a case that calls for the interposition of the court in his behalf?

The term "accident," in its legal signification, is difficult to define. Judge Story defines it as embracing "not merely inevitable casu-

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alty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party" affected thereby. 1 Story Eq., § 78. Mr. Pomeroy justly criticises this definition as including what are not accidents at all but mistakes, and as omitting the very central element of the equitable conception, and defines it thus: "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." 2 Pom. Eq., § 823, n. 1. And the chief point of the thing is, that because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is in good conscience entitled to relief that will restore those relations to their original character, and place him in his former position. 2 Pom. Eq., § 824. But as a general rule, relief will not be granted unless it can be done with justice to the other party; for if he cannot be put in as good a situation as he would have been in had the other party performed, the court will not interpose. *Rose v. Rose*, Amb. 331.

Equity in many instances relieves against forfeitures occasioned by the non-payment of money at a day certain; and this, although there is no accident, but negligence instead; on the ground that the condition and the forfeiture are regarded as merely security for the payment of the money. This is the ground on which tenants are relieved from forfeitures for the non-payment of rent as stipulated, and mortgagors are allowed to redeem after the law-day has passed. And although the agreement is not wholly pecuniary nor measured by pecuniary compensation, still, if the party bound by it has been prevented by accident without his fault from an exact fulfillment, so that a forfeiture is thereby incurred, equity will interpose and relieve him from the forfeiture, upon his making compensation, if necessary, or doing every thing else in his power to satisfy the equitable rights of the other party. 2 Pom. Eq., § 833. In *Cage v. Russell*, 2 Vent. 352, it is laid down as a standing rule of equity that a forfeiture shall not bind when the thing can

be done afterward, or any compensation can be made for it. Forfeitures are odious, and courts struggle against them; and relief is granted for the non-performance of divers collateral acts whereby they are incurred; as, for not laying out a specific sum in repairs in a given time, *Sanders v. Pope*, 12 Ves. 282; for cutting down timber when covenanted against, *Northcote v. Duke*, Amb. 511; for not renewing a lease in time, *Rawstorne v. Bentley*, 4 Bro. C. C. *415, and the like. Relief is also granted against forfeitures incurred by unintentional breaches of the condition of mortgages for support, on terms that the party in fault fully compensate and indemnify the other party for all he has lost by reason of the breach. *Henry v. Tupper*, 29 Vt. 358.

In *Adams v. Haskell*, 10 Wis. 123, the defendants were prevented by accident from reaching the place of a foreclosure sale until after it was completed, and the court for that reason ordered a re-sale, but on terms.

In *Pierson v. Clages*, 15 Vt. 93, the orator, by reason of pending negotiations of settlement, without negligence on his part, let the time of redemption expire; and he was relieved by opening the decree and giving further time to redeem.

The case of *Bostwick v. Stiles*, 35 Conn. 195, is confessedly much in point. That was a bill to open a decree of foreclosure and obtain further time. The mortgage debt was about \$4,000, and the value of the premises twice that sum. The time limited for payment was August 5. The petitioner intended to redeem, but not having sufficient means of his own, he applied to his uncle (a man of property) to help him, and he agreed to, and to furnish the money on August 3, on which the petitioner relied; but for some reason not explained he did not furnish the money as agreed, and the petitioner delayed making other arrangements until the evening of August 5, when he applied to Russell for assistance. Russell had no money, but plenty of government bonds, and agreed to make payment in them if defendant would take them, and accordingly went to defendant's house that evening after defendant had gone to bed, and told his wife that he had come prepared to redeem the mortgage for the petitioner, but defendant did not get up, but sent word by his wife that he was sick, and Russell went away. On this state of facts the court held that the petitioner's failure to pay on August 5 was occasioned by accident, without fault or neglect on his part, and that the accident lay in the fact

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of his uncle's failure to furnish the money as agreed, and as the petitioner had reason to believe he would. The court says that there is a degree of uncertainty in regard to all business expectations, and that no more ought to be required in respect of future obligations imposed by law than that such means shall be taken to fulfill them as will render it reasonably certain, as far as human sagacity can foresee, that they will be performed.

It is common in England to enlarge the time of redemption on application before the day of payment; and though the indulgence is not granted of course, it is said not to require a very strong case to obtain it. And the time may be enlarged more than once. Thus in *Jones v. Creswicke*, 9 Sim. 304, after the time had been enlarged, and after the order absolute had been made, though not drawn up, the time was again enlarged, on the ground that the man who had agreed to lend the defendant the money was prevented by illness from going up to London on the day it was due, and his wife, whom he had deputed to carry it up, was prevented from doing so because the London coach was full the day before. And see *Edwards v. Cunliffe*, 1 Madd. 287.

And the decree may be opened after the order absolute has been made and enrolled. Thus, in *Ford v. Wastell*, 6 Hare, 229, notwithstanding the order absolute had been drawn up and enrolled, the decree was opened because all the plaintiff's property was involved in an administration suit that she was justified in believing would terminate in season to enable her to avail herself of her property with which to meet the payment, but which had not yet terminated. See also *Thornhill v. Manning*, 1 Sim. N. S. 451, in which the promptness of the mortgagor in applying was regarded as the great and important feature in the case to guide the court in deciding what it ought to do.

Applying these principles as shown and illustrated by the cases, it is quite out of the question to say that the defendant is entitled to keep this property, and that the orator has not made a case that calls for the interposition of the court in his behalf.

The orator gave \$13,500 for the property, and had paid \$2,724 toward it, and expended about \$10,000 upon it in improvements and repairs, and on January 1, 1885, the time limited by the decree for paying the installment of \$500, he believed the real estate fairly worth \$5,000 or \$6,000 more than he gave for it. He was exceedingly anxious to redeem the property, but had no available means

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of his own, and relied for means wherewith to pay his debts partly on income assured to members of his family, and partly on the equity of redemption in the property, his ability to make which available at the value he put upon it being his only means of escape from absolute bankruptcy. It appears that his wife and her sister, Miss Jenkins, owned property in New York city, as to which he was agent, and that before and on December 29, 1884, he had been in negotiation with one Martin of that city in respect to leasing it to him, and it was agreed that on delivery of proper leases thereof, Martin should advance to him \$650 toward performance on his part, and Kopper relied on the use of that money to pay the \$500 installment. Accordingly, he went to New York on December 30, with the leases executed, found Martin and made an appointment with him for eleven o'clock the next day, and in going to the place at the time appointed, found a message postponing the appointment to the office of an attorney down town at two that afternoon, whereupon, being unable to communicate with Martin, he went to the office down town at two, and found that Martin had been there but had gone. He afterward met Martin on the street, and being exceedingly anxious to obtain the money, persuaded him to go back to the attorney's office, but he being out, they went to another attorney's office, and he was out, and finally he persuaded Martin to give him his check for \$650 before the leases were approved by an attorney. But this was after three o'clock, when all the banks in the city were closed. Said check was good, but being drawn on a bank in the upper part of the city, and it being after banking hours, it was impossible for Kopper to draw the money on it that day. He had for several years kept a deposit account with the Second National Bank of that city, and had at this time a small balance standing to his credit there, and that bank was accustomed to place to his credit the amount of such checks as he deposited there properly indorsed. He had previously carried checks to that bank after business hours for deposit, handing them in over the railing, to be credited to him at the opening of the bank next day. On this occasion he properly indorsed said check "for deposit," and sent it to said bank by a district messenger boy, but whether it reached the bank or not that day does not appear. At the same time he drew two checks on said bank to the order of the person who was then the clerk of the court in which the decree was obtained, one for \$575, which he

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supposed to be the amount required to pay said installment, but which was in fact more than was required, and one for \$25, for a sum otherwise payable to the clerk, inclosed them in an envelope with a letter to the clerk, went to the Grand Central Depot, and sent the package to Middlebury by the porter of the sleeping-car, inclosing it in another envelope to the station-agent there, requesting him to deliver the package to the clerk immediately, which he did on the morning of January 1, which was a legal holiday in New York, and the \$650 check was passed to Kopper's credit by the Second National Bank on the next day — the first business day after it was received. Dyer refused to take Kopper's check of the clerk, and the clerk did not treat it as payment of the installment, nor regard it as available funds in his hands until it was paid and the avails credited to him by the collecting bank, which was on January 5, on which day he was trusted by some of Kopper's other creditors, and on the 6th this bill was brought.

On these facts, and the others disclosed by the record, Kopper cannot justly be charged with negligence. The means he had taken to obtain the money rendered it reasonably certain that he would succeed, and that he was anxious to obtain it abundantly appears. That he did not meet Martin at eleven or at two, was an unforeseen and an unexpected occurrence, external to himself, of which his agency was not the proximate nor even the remote cause, and thereby he was prevented from sending his money seasonably in a form that would have been treated as payment, whereby, contrary to his own intention and wish, he lost his legal right to pay, and Dyer acquired a legal right not to have him pay; and in these circumstances, Kopper is entitled to relief that will reinstate him in his former position, on terms that he satisfy the equitable rights of the other party.

[Omitting minor points.]

The decree dismissing the cross-bill is affirmed; but the decree for the orator in the original bill is reversed, and the cause remanded, with mandate.

Cause remanded.

STOWELL V. HASTINGS.

(59 Vt. 494.)

Will — construction — repugnancy — life estate or fee.

A will gave to the testator's wife the residuum "for her benefit and support, to use and dispose of as she may think proper," and then provided that if any of the estate should be left in her possession at her death it should be equally divided between the brothers and sisters of the testator. *Held*, that the wife took an absolute estate, and that the remainder over was void for repugnancy.

A PPEAL from Probate Court. The opinion states the case.

A. E. Cudworth and Martin & Eddy, for plaintiff.

E. L. Waterman and C. B. Eddy, for defendant.

TAFT, J. The important question in this case is, whether Mrs. Stowell took an absolute estate in the property which passed to her under the residuary clause in her husband's will. It reads as follows:

"I give to my beloved wife, Hepsibah H. Stowell, the residue and remainder of all my estate, both real and personal, for her benefit and support, to use and dispose of as she may think proper. If any of the estate should be left in my wife's possession at her death, it is my will that the same should be equally divided between eight of my brothers and sisters," etc.

The decree of the Probate Court in 1872 settled no question involved in this case.

The testator gives his wife the residue of his estate for her benefit and support, with an absolute power of disposition; no conditions annexed to the gift, no words limiting the use of the property; and giving the words used their usual signification, she is put in the place of the testator as to the title and all rights to the property.

If an estate be given to a person generally or indefinitely, with an absolute power of disposition, it carries a fee and a remainder over is void for repugnancy. 1 Eq. Cases Abr. 176; 4 Kent Com. (2d ed.) 535; *Smith v. Van Ostrand*, 64 N. Y. 278; *Campbell v. Beaumont*, 91 N. Y. 464; *Seibert v. Wise*, 70 Penn. St. 147; *Ramsdell v. Ramsdell*, 21 Me. 288.

"In general, however, a limitation over after a fee is held to be repugnant to the estate first granted, and is itself rejected." 2 Jarm. Wills, 44, n. 1. "It is a settled rule of American as well as English law." 2 Redf. Wills, 278.

Where the *jus disponendi* is conditional, as in those cases where the property is given for support only, with power over the principal for that purpose, or the estate given the first taker is one for life only, a different rule may prevail and the gift in remainder be valid, for in such cases, no absolute estate is given the first taker. In determining what estate is given the first taker, the whole will should be considered, and all the clauses construed together. Even in those cases where an absolute estate is in terms given, if subsequent passages unequivocally show that the testator meant the legatee to take a life interest only, the prior gift is restricted accordingly. Jarm. Wills, chap. 15. Such are the cases in this State of *Richardson v. Paige*, 54 Vt. 373; *McCloskey v. Gleason*, 56 Vt. 264; and such construction was given the will in *Smith v. Bell*, 6 Pet. 68.

If we could construe the will in question as giving the residue to Mrs. Stowell for her support only, which is the construction the appellants insist should be given it, their claim might be upheld. It was given for her support, but not for that alone. It was for her benefit, and using the synonyms of the word, it was for her advantage, her profit, her gain, her account, her interest. The word "benefit" and its synonyms mean more than simply support. They mean any purpose to which the absolute owner of property can devote it; and given for that purpose, they mean that Mrs. Stowell had unlimited power to dispose of it at her pleasure. If we held that Mrs. Stowell had no right to dispose of the estate, save only for her support, we think it would be clear violation of the intention of her husband, and a substitution of the will of the court for that of the testator. A will should be construed as a whole, and effect given to each and every part of it if possible; but it must be conceded that the two intents of the testator, as expressed in repugnant provisions, cannot both be carried out. There is a gift to the first taker and another in remainder. The clauses should be construed together, and effect given to both, if consistent with the rules of law. Where it is clear, considering the language used, that the testator intended a life estate in the first taker, or a use of the bequest for support only, or any other limited purpose, there is no difficulty in carrying out the full intent of the testator

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by giving force, after the first estate is ended, to the clause creating the estate in remainder; but where it is clear, judging from both clauses, that by the gift in remainder the testator did not intend to limit the use of the property in the hands of the first taker in any respect, and in the bequest to the first taker gives an absolute estate, using words which admit of no other construction, the rule as to the repugnancy must apply. We do not think that Mr. Stowell intended by the gift in remainder, to limit the use which his wife might make of the residue. We think he intended she should take his own place in respect to it, and use it in an unlimited manner; and his intent in that respect should be carried out. We see no difference in the meaning of the words if transposed so as to read "to use and dispose of as she may think proper for her benefit and support." This holding renders it unnecessary to pass upon any other question.

Judgment affirmed. Cause ordered certified to the Probate Court.

Judgment affirmed.

SHERWIN V. SANDERS.

(50 Vt. 499.)

Marriage — promise of wife during and after coverture — consideration.

The promise of a married woman, having a separate estate, to pay for necessities furnished her upon the credit of her estate, will sustain a new promise to pay for them made after the death of her husband.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

A. E. Cudworth and Haskins & Stoddard, for defendant.

Waterman & Martin, for plaintiff.

POWERS, J. The jury has found that the defendant, whilst she was a married woman having a separate equitable estate, promised to pay the plaintiff for goods needed in her family, which he sold to her upon the credit of such estate, and that after the death of her husband she again expressly promised to pay the same debt. This action is *assumpsit* based upon the latter promise.

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In the court below the defendant took no issue upon the question whether she in fact had a separate estate capable of equitable pledge for necessities sold upon its credit; but she stood for her defense upon the ground that her promise made while covert was valid at law and capable of enforcement in equity only against her separate estate, and that her promise after coverture ceased, was without legal consideration to uphold it.

This court sits for the correction of errors made by the County Court in the trial of cases upon the issues made up by the parties. We have no authority to make up a new issue not raised in that court and proceed to determine it for the first time. If no ruling is made by the County Court upon a question that might have been raised, it is plain that no error is predicable of that question.

The court below treated the question of the existence of a separate estate as a fact not disputed, as the parties treated it. It was not directly presented as it was in *Hubbard v. Bugbee*, 58 Vt. 172; s. c., 45 Am. Rep. 637. There the referee directly presented the facts upon which it was to be determined whether a separate estate existed. It was such and no other, as the will conferred, and the referee submitted to the court whether the promise found, in view of the estate created by the will, was binding at law upon the defendant.

Here however the terms of the deed are not disclosed, and were not considered by the County Court, and that court had no call to construe them. The argument therefore in behalf of the defendant upon this branch of the case should have been addressed to the court below.

We have no occasion to repeat what was said in *Hubbard v. Bugbee* respecting the facts essential to the creation of a separate equitable estate in married women.

If such estate exists the married woman may pledge it for necessities for herself and family. It must fairly appear that she intends to have the party dealing with her rely upon the credit of her estate, and that he does rely upon it. This much appearing the equitable contract is perfected. During coverture, and by reason of coverture, this contract must be enforced by equitable remedies. After coverture a new promise to perform it is based upon sufficient consideration. During coverture a married woman's promise does not bind her personally, but having a separate equitable estate, respecting which she is not clogged by the fetters of coverture, her

promise charges her conscience and binds her estate to fulfill it. The authorities cited in *Hubbard v. Bugbee*, *supra*, fully sustain this position.

The case of *Lee v. Muggeridge*, 5 Taunt. 36, was, like the case at bar, an action of assumpsit based on the promise of a widow having a separate estate to pay a debt contracted on the credit of such estate during coverture. The question was whether her promise after coverture was based on sufficient consideration. Lord MANSFIELD said: "It has been long established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action." HEATH, J., said: "The notion that a promise may be supported by a moral obligation is not modern."

This case has been criticised somewhat, not on the ground that upon the special facts appearing the decision was wrong, but that the propositions laid down were too broad for general application. *Eastwood v. Kenyon*, 11 Ad. & Ell. 447; *Beaumont v. Reeve*, 8 Q. B. 487; 1 Pars. Cont. 432, n. (s).

In these cases it is said that the subsequent promise is binding only when the antecedent obligation was a legal one.

It is not improbable that this qualification of the rule laid down in *Lee v. Muggeridge* itself needs qualification. If the antecedent obligation is an equitable one, that is, one that equity would enforce, Lord MANSFIELD's doctrine is easily harmonized with that of its critics. Baron PARKE, in *Earle v. Oliver*, 2 Exch. 71, has harmonized both views as follows: "The principle of the rule laid down by Lord MANSFIELD is that when the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law, and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it."

In a later case, *La Touche v. La Touche*, 3 Hurl. & Colt. 576, it was held that a promissory note given by a widow to extinguish a balance due upon her note given during coverture, which bound her separate estate and which was barred by the statute of limitations, was based on good consideration. CHANNELL, B., said: "The note of 1848, although made during coverture, was binding on the defendant's separate estate. Unless something occurred to discharge the defendant's separate estate from liability, there was,

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we think, a good consideration for the note now sued upon, made by her after her coverture was determined." In *Rusling v. Rusling*, 47 N. J. L. 1, BEASLEY, C. J., in discussing an analogous principle, formulates the rule thus: "By such a promise, what before was an equitable obligation, is converted into a legal obligation."

In *Vance v. Wells*, 8 Ala. 399, it was held that when goods are furnished to a married woman on the faith of her separate estate, there is such a moral obligation to pay the debt as will support an action at law on a promise to pay after the coverture has ceased.

In *Goulding v. Davidson*, 26 N. Y. 604, the same doctrine was laid down in a similar case.

In the case at bar the defendant received value to her own use from the plaintiff, who relied upon her promise to pay and upon her separate estate as the means of enforcing pay. Her promise, by the accident of her coverture, was void at law, but valid in equity. Her subsequent promise to pay after coverture is clearly founded upon good consideration.

The item of \$8.45 was properly dealt with by the court. The jury found it was for necessities for the family, and the goods were procured by Hiland at the defendant's request. Hiland's willingness to pay his mother's debt does not absolve her from it. There is more question respecting the \$20 item. But the case fairly shows that this item was disallowed by the jury, so the defendant has suffered no harm.

The judgment is affirmed.

Judgment affirmed.

STATE V. WYMAN.

(50 Vt. 587.)

Criminal law — incest — knowledge — "brother."

In an indictment for incest, it is not necessary, unless required by statute, to allege knowledge of the relationship on the part of the defendant. (*See note, p. 755.*)

In the statute against incest, "brother" includes a brother of the half-blood.

CONVICTION of incest. The opinion states the case.

Waterman & Martin, for respondent.

F. A. Bolles, for State.

ROYCE, C. J. Two points only are urged in behalf of the respondent.

First. That the indictment is fatally defective in that it does not charge the respondent with knowledge of the relationship existing between himself and the *particeps criminis* at the time of the commission of the crime charged.

The indictment is based upon R. L., § 4246, which provides that "persons between whom marriages are prohibited by section 2306 or section 2307, who intermarry, or who commit fornication with each other, shall be punished as in case of adultery." The indictment sufficiently charges that the respondent was related to the *particeps* within the degrees of consanguinity specified in sections 2306-2307, and that he committed fornication with her. Fornication is only made a crime when committed by persons within certain degrees of consanguinity. It is therefore a statutory crime purely, and its definition and the proceedings to punish persons charged with it are dependent upon the words of the statute itself. The statute is entirely silent as to any *scienter*. It does not say that a person who knowingly or willfully commits fornication with one related to him or her within the degrees of consanguinity which prohibit marriage, shall be punished, etc. To come within the statute therefore it was not necessary to allege knowledge of the relationship. Bish. Stat. Crimes (2d ed.), §§ 729, 732, 733.

Second. That the indictment is not sustained by proof that the respondent committed the offense with a daughter of his half-brother, it being claimed that the word "brother" in the statute is not broad enough to cover a brother of the half-blood. In support of this claim it is urged that at common law a brother of the half-blood is not a brother, and cannot inherit as such. It is true that by the common law a brother of the half-blood could not inherit; but this was a rule for the regulation of the descent of property, and had no broader scope. It did not undertake to affect the relations of brethren of the half-blood any further than to prescribe, for certain reasons having their origin in the ancient system of feudal tenures, that in the descent of the inheritance a brother of the half-blood should be left out. The common-law rule therefore

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would have no force in a case of this kind, but the generally understood significance of the word "brother," as used in the common affairs of life, and as defined by the lexicographers of recognized authority, should be adopted in the construction of the statute.

In the present case however all question is removed by R. L., section 2231, which provides that "the degrees of kindred shall be computed according to the rules of the civil law," and by these the half-blood are admitted in all respects equally with the whole blood. 2 Kent Com. 422.

The respondent takes nothing by his exceptions.

NOTE BY THE REPORTER. — In *State v. Dana*, 59 Vt. 623, a case of incest, this court said: "This is not a crime where the statute makes it necessary to allege and prove affirmatively that the respondent knew the relationship existing between him and the *particeps*. The respondent's knowledge of the relationship is not made an essential part of the crime. We have another statute which makes it a crime to carnally know a female child under the age of eleven years with or without her consent. Would it be necessary to allege and prove affirmatively that the accused knew she was under the age of eleven years, a fact extremely difficult, and in most cases impossible to prove? We think not. A more reasonable and practicable rule is that if a person willfully does an unlawful and criminal act, he takes upon himself all the legal and penal consequences of such act regardless of his knowledge, unless knowledge is made an essential ingredient of the crime. This same question was raised and decided by the Supreme Court, in the case of *State v. Wyman*, 59 Vt. 527, on an indictment upon the same statute, where the court held it was not necessary to allege knowledge of the relationship in such an indictment."

STATE V. ARCHIBALD.

(59 Vt. 548.)

Criminal law — breach of peace — intent.

A statute provides that a person who "disturbs or breaks the public peace by tumultuous and offensive carriage," etc., shall be punished. An indictment charged in one count that the defendant "did disturb and break the public peace by his tumultuous carriage," etc., and in another that he "quarrelled with the said Day, by cursing and swearing at the said Day, and by calling him opprobrious, indecent and obscene names," and alleged that it had the effect to disturb the public peace. *Held*, valid.

CONVICTION of breach of peace. The opinion states the case.

Norman Paul and William E. Johnson, for defendant.

William Batchelder, State's attorney, for State.

ROYCE, C. J. The indictment is under R. L., § 4228, which provides that a person who "disturbs or breaks the public peace by tumultuous and offensive carriage, by threatening, quarrelling," etc., shall be punished as prescribed; and the respondent claims that the indictment is insufficient in that it does not allege that the respondent committed either of the offenses set forth in the statute, which constitute a breach of the public peace.

Referring to the indictment, it will be seen that it charges in the first count that the respondent, on a day certain, at a place certain, with force and arms, "did disturb and break the public peace by his tumultuous carriage then and there exhibited to the public," and then proceeds to specify wherein this "tumultuous carriage" consisted, and to declare that it had the effect to disturb the public peace. The second count, opening in the same language as the first, but charging the offense on another day, adds the allegation that the respondent "then and there quarrelled with the said Day, by cursing and swearing at the said Day, and by calling him opprobrious, indecent and obscene names," which, it is alleged, had the effect to disturb the public peace.

Several acts or offenses, necessarily different and distinct, are embraced within the terms of the statute; and an indictment under it must, unquestionably, charge with the degree of certainty and particularity required in criminal pleading, the commission of some one of these acts or offenses, and that the effect of it was to disturb or break the public peace. The first count of this indictment is certainly open to criticism. "Tumultuous and offensive carriage," in the conjunctive, is one of the things denounced by the statute. The first count charges "tumultuous" but not "offensive" carriage, and the objection that it failed to charge a complete offense would have much force. A man's carriage might, conceivably, be "tumultuous," as in the noisy expression of joy over some great national good or achievement, and yet be the opposite of "offensive," and tend to spread rejoicing and good-will rather than to disturb or break the public peace, in the true sense of that term.

But it is unnecessary to pass upon this point, as in our judgment the second count sufficiently charges another and distinct offense

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named in the statute, which is a breach of the public peace by quarrelling; and as the evidence strongly sustains that charge, the conviction may properly stand upon the second count. *State v. Hanley*, 47 Vt. 290; *State v. Carpenter*, 54 Vt. 551.

No allegation of an intent to break the public peace was necessary. The statute does not require it, and the act is of a character which necessarily imports intent.

In the view above taken the respondent's second, third and seventh requests to charge, as well as a part of the first, become immaterial; and upon the points raised by the other requests we think the charge of the court was as full and explicit as could be required, and that the law was correctly stated by the learned judge.

The evidence received as to what was said by the respondent, the manner in which it was said, and what transpired, was properly admissible upon the question of whether the words and acts of the respondent amounted to quarrelling, and had the effect to break or disturb the public peace.

We find no error in the record, and the respondent takes nothing by his exceptions, and is sentenced to pay a fine of \$20 and costs, with the alternative sentence as prescribed by the statute.

GLEASON v. BEERS.

(50 Vt. 551.)

Bailment — custom saw-mill.

When one delivers logs at a custom saw-mill to be sawed at an agreed price, the owner of the mill becomes bound to exercise ordinary care in keeping and manufacturing the logs, and in case of their loss to prove that it was without his fault.

A PPEAL from Probate Court. The opinion states the case.

J. A. Wing, for plaintiff.

W. P. Dillingham and *C. F. Clough*, for defendant.

Ross, J. But three items named in the report of the referee are in contention. Item 22 of the plaintiff's account, we think, was properly allowed by the County Court. The intestate owned and

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operated a custom saw-mill. He thereby invited the custom of the plaintiff. The plaintiff delivered at the mill the logs named in this item, to be sawed, for which he was to pay the intestate an agreed compensation. This was a bailment of the logs to the intestate for the mutual benefit of the bailor and bailee. This obligated the bailee to the exercise of ordinary care in keeping and manufacturing the logs. They were in the possession of the intestate, to be accounted for by him or his estate, either as logs or manufactured lumber. The estate has not accounted for the logs included in this item, either as logs, lumber, or as lost or destroyed without the fault of the intestate. Ordinary care requires that the estate should either produce the logs or the lumber, or show they were taken from the possession of the intestate by the plaintiff, or were lost or removed without the fault of the intestate. This is the ordinary rule in this class of bailments. Story Bailm., §§ 442 *et seq.*

[Minor points omitted.]

We find no error in the judgment of the County Court, and that judgment is affirmed. *Judgment affirmed.*

ANGUS v. ROBINSON.

(50 Vt. 585.)

Parties — joint contract — severance.

Joint contractors must all sue upon their joint contract, although one of them has been settled with, unless all the parties agree to the severance of the joint interest, and the obligor promises to pay each his several share, and the suit is based upon the new promise.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Crane & Alfred, for plaintiff.

Edwards, Dickerman & Young, for defendants.

POWERS, J. The fourth count demurred to sets out a contract made by the plaintiff and Goff jointly of the one part and the defendant's intestate of the other part, whereby certain stock and bonds of the Montreal, Boston and Portland railway were sold to such

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intestate, and certain labor was to be done upon said railway as part consideration for such sale. It also avers the delivery of certain other bonds by said Angus and Goff to the intestate to insure the performance of their contract. It further avers full performance of the contract by Angus and Goff.

In this posture of things the plaintiff discloses a perfected right of action in Angus and Goff to recover the unpaid purchase-money of the stock and bonds sold, and also the bonds put up as collateral or their proceeds, if converted by the intestate to his own use.

The count further avers that after performance by Angus and Goff of the contract on their part, the intestate settled with Goff for his interest in the contract and his interest in the collateral bonds; and the plaintiff's contention is, that he may now maintain an action in his own name to recover one-half the unpaid purchase-money and half the proceeds of the collateral bonds.

We think such action cannot be maintained.

The sale of the stock and bonds with the collateral undertaking to put the railway in running condition was the consideration of the intestate's promise. The delivery of the collateral bonds was a mere incident of such sale—a mere security for the performance of the principal contract by Angus and Goff.

If Robinson had contracted with Angus and Goff severally for the share of each in the stock and bonds, and promised them severally to pay for such shares, it would be quite another thing. But however as between themselves the ownership of the stock and bonds in truth was, the declaration states their interest to be "joint and equal," and sets them out as joint contractors; and the principle that joint contractors must all sue upon their contract is too elementary to require the citation of authorities.

Robinson's settlement then with Goff for his interest was in substance a satisfaction of the joint indebtedness *pro tanto*. What Goff received belonged to Angus and Goff, and the balance due from Robinson belongs to them jointly. It is not the case of the novation of a contract.

If Angus, Goff and Robinson had mutually agreed upon a disintegration of the demand, and Robinson had promised to pay Angus his share, the case would be different. But here Angus was no party to the severance made by Goff and Robinson, and was not bound by it; and if it did not bind him, it did not bind them in respect to him.

The cases cited by the learned counsel for the plaintiff are not in conflict with this holding.

In *Hall v. Leigh*, 8 Cranch, 50, a consignee sold merchandise for two owners. But each owned one-half severally, which fact was disclosed in the assignment, and separate instructions for the sale were made.

In *Beach v. Hotchkiss*, 2 Conn. 697, defendant had paid one of several joint contractors his share of the common debt, but had not liquidated the account with the others. Assumpsit cannot be maintained by the others severally for their share.

Some language is used by the court giving support to the plaintiff's contention in the case at bar, but the result of the case is inconsistent with it.

In *Austin v. Walsh*, 2 Mass. 401, A. and B. jointly ship goods consigned to C. to sell. After shipment A. and B. sever their interest in the adventure, and A. gives B. written directions to C. to pay B. his moiety. B. shows this direction to C., who refuses to account to B., but says he will pay B. if proceeds belong to him. It was held that the agreement between A. and B. to sever their interest would not entitle them to sue C. severally unless after notice C. had consented to it, and to account to each for his share. But as the action was not on the original contract, but on C.'s promise to pay B. if he was entitled, and he had shown he was entitled, he might recover.

Without further review, the true rule appears to be that where all the parties in interest in the joint contract agree to a severance of the joint interest, and the obligor promises to pay each his several share, each may sue therefor, the suit being based upon the promise to pay each severally, and not in the original joint promise.

Here the count is clearly in assumpsit, and the right of recovery is based upon the original undertaking.

The act of bringing the suit cannot in law be effectual to work a severance of the joint interest of Angus and Goff, and thus by way of a ratification of the unwarranted severance made by Goff and Robinson, give Angus a several action. The severance must first be made and a new promise must appear as the basis of the new right of action springing from the severance.

The judgment of the County Court sustaining the demurrer and adjudging the plaintiff's new fourth count insufficient is affirmed, and the case remanded.

Judgment affirmed and case remanded.

GREEN V. ADAMS.

(50 Vt. 602.)

Marriage — divorce — alimony — fraudulent conveyances.

S. was convicted and imprisoned for arson, and his wife procured a divorce therefor, and the court granted her alimony. Before and in anticipation of the conviction and divorce, he fraudulently transferred his personalty to G., in trust for his wife so long as she remained his wife, and in case she procured a divorce, for his mother and brother. The defendant F. attached the fund under a judgment which he had obtained against S. for burning his property. On interpleader by the trustee, *held*, that the transfer was void as to the wife, and the fund belonged to her by virtue of the decree for alimony, and that F.'s claim, being founded in tort, did not attach to it.

INTERPLEADER. The opinion states the case.

J. A. Wing, for defendant Folsom.

Heath & Willard, for defendant Hattie V. Adams.

WALKER, J. This is a bill of interpleader by which the orator asks leave to pay the funds in his hands under a conveyance to him by Josiah W. Seaver for certain purposes under a so-called trust, to such one of the defendant claimants as the court shall decree it of right belongs.

It appears from the pleadings and master's report that on the 26th day of October, 1879, Josiah W. Seaver, of Waitsfield, who then was the lawful husband of the defendant Hattie V. Adams (then called by the name of Seaver), having confessed that he was guilty of the crime of arson in burning several farm-buildings in that vicinity, among which were the barns of the defendant George W. Folsom, and expecting to be confined in the State prison in punishment therefor, sent for the orator and with his consent transferred and delivered to him substantially all his property, which consisted of the following notes: Two notes signed by William and F. G. Farr, one for \$430 and one for \$70; also two notes signed by L. W. Seaver, one for \$200 and one for \$10, with the accrued interest on the same. These notes were delivered to the orator upon the condition that he collect and pay from the avails thereof certain small bills mentioned, and procure for Josiah counsel in the arson

cases, and that the balance of the fund should be held by the orator for the support and maintenance of his wife, Hattie V. Seaver, so long as she remained his wife, but no longer. This so-called trust was further conditioned that if his wife Hattie should die or obtain a bill of divorce from him, the funds then remaining in the hands of the orator should no longer be used for her benefit and support, but should be applied and appropriated to the use and benefit of his mother, Mary Seaver, during her life, and if any sum remained at her death it was to be appropriated to the use of his brother.

The orator caused a memorandum of this conveyance and trust to be made in writing on the twenty-seventh of October. Hattie, the wife of Josiah, knew that this property was put into the hands of the orator, but it is not found that she knew or assented to the terms and conditions under which the property was passed over to him, or that she accepted of its provisions.

On the twenty-seventh day of October the said Josiah W. Seaver was arrested upon the charge of arson, of which he had previously confessed he was guilty, and committed to jail in Montpelier. The Washington County Court being then in session, an information was immediately filed against him for the crime of arson, to which he pleaded guilty, and was thereupon sentenced by the court to be confined in the State prison for the term of twenty-five years, and was confined in prison upon said sentence.

The orator collected \$525.80 on the notes thus passed over to him by Josiah, and paid debts to the amount of \$56.17, which left in his hands \$469.63. He thereafter paid Hattie one year's interest on this balance, \$28.15, and for taxes, etc., \$11.81; the balance with the accumulations, less taxes, is still in the hands of the orator.

The two notes against Levi W. Seaver have not been collected, as they are not collectible. The orator allowed, by direction of Josiah, \$60 to Levi on said notes for the support of his mother in 1879 and 1880 under a previous contract.

In February, 1881, Hattie brought her petition for a divorce from Josiah returnable to the March term of Washington County Court, setting up as a cause his confinement in State prison; on which an injunction was granted forbidding Josiah disposing of his property pending the divorce proceedings, which was duly served. At said March term of court, and on the twelfth day of April, the said Hattie was by said court granted a bill of divorce from said Josiah by reason of his confinement in prison and allowed to resume

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her maiden name of Adams. On the granting of this divorce the court decreed to her as alimony all the funds in the hands of the orator under the so-called trust in whatever form they might be. This term of court was adjourned *sine die* April 14. On the fifteenth of April, the defendant George W. Folsom, sued out a writ against Josiah W. Seaver, returnable at the next September term of the court, on a judgment obtained by him at said March term against Josiah in an action of trespass, *quare clausum fregit*, for burning his property, and therein summoned the orator and Levi W. Seaver, as trustees of Josiah. This writ was served on them as such trustees April 18, and duly entered in court, where the cause is now pending. The orator was notified of Hattie's divorce, and also that all the funds remaining in his hands of the property passed over to him by Josiah were decreed to her as alimony by her attorney by a letter sent to and received by him before the service of the trustee writ upon him. Levi was not notified of this decree of alimony before the service of the trustee writ upon him.

The defendants, Levi W. Seaver, the brother of Josiah, and Mary Seaver, his mother, answered the orator's bill, substantially admitting the allegations thereof, but made no claim to the property in the hands of the orator otherwise than they pray that the fund may be held for the support of Mary pursuant to the condition of the so-called trust. Mary has deceased pending this proceeding, and no claim is made in this court in behalf of her or her estate. No appearance or argument has been made in this court in behalf of Levi, and he makes no claim to the fund in his own behalf in his answer.

The issue presented in this court is wholly between the defendant Hattie V. Adams and the defendant George W. Folsom.

The defendant Hattie claims to hold the fund on the ground that the conveyance or transfer of the property by Josiah to the orator was fraudulent and void as against her, and that the decree of the County Court granting this property to her as alimony passed the title of the same to her, and that her title thereto was perfected by her notification to the orator of her decree of alimony before the service upon him of the defendant Folsom's trustee writ.

The defendant Folsom claims to hold the fund on his trustee writ on the ground that the conveyance of the property to the orator was fraudulent and void against him as a creditor of Seaver; and

claims that the conveyance was not fraudulent and void as to Hattie, because it was personal property, and the husband had the right to dispose of his personal property, whether the wife understood the terms of the conveyance or not, even if done with the intent to defraud his wife of any right or duty she had against him, or to deprive her of the use of it.

So the principal question presented by the case is whether the defendant Hattie V. Adams is within the protection of section 4155, R. L., which makes void fraudulent conveyances of property as to the injured party, so that the conveyance alleged to be fraudulent was void as against her. If she is within the protection of this statute, and the conveyance was fraudulent, the property, as to her, though in the hands of the orator under a so-called trust arrangement, was still the property of her husband and subject to any lawful order of court, as his property and the title and ownership thereof was legally passed to and vested in her by the order of court decreeing it to her as alimony.

Section 4155, R. L., provides that: "Fraudulent and deceitful conveyances of houses, lands, tenements or hereditaments, or of goods and chattels; all bonds, bills, notes, contracts and agreements; all suits, judgments and executions made or had to avoid a right, debt or duty of another person, shall, as against the party only whose right, debt or duty is attempted to be avoided, his heirs, executors, administrators and assigns, be null and void."

No distinction is made in this statute between realty and personalty. It includes all kinds of property and choses in action. All conveyances of property made or had to avoid a right, debt or duty of another person are made void as against the party whose right, debt or duty is attempted to be avoided. It is not designed to protect creditors alone, in the strict sense of the term. It embraces all persons who have a right or debt against the conveyancer, or to whom he owes a duty, which he attempts to avoid.

The master finds that "the placing of the property in controversy in the orator's hands by the said Josiah W. Seaver was done in contemplation that his wife might get a bill of divorce from him, as he had confessed to the burning of a large amount of property of which he was sure to be convicted and sent to the State prison, and he did this to place the property so she would not get it if she obtained a divorce, as he then well knew what her rights would be in reference to a divorce." This is an express finding that the

notes were delivered to the orator for the purpose of avoiding the payment of alimony which might be decreed to his wife Hattie on the granting to her of a divorce from him, which he expected and well understood she ultimately would have a cause for by reason of the punishment consequent upon his crime. It was done with the intent of defrauding his wife of her right to alimony out of his property.

It was held in *Foster v. Foster*, 56 Vt. 540, that a claim for alimony is incident to and consequent upon divorce; and that a wife having a cause for divorce, though not in strict language a creditor of her husband, stood to him in the relation of a creditor having an inchoate right of payment of whatever alimony might thereafter be decreed to her, and that therefore she came within the purview of the statute making void fraudulent conveyances of property as to the party injured.

In the case at bar the cause of divorce did not exist at the time of the delivery of the notes to the orator, but the husband had committed and confessed a crime, upon the punishment for which a cause for divorce was consequent; upon the due execution of the law the cause would in all probability arise. Nothing but death could thwart the punishment sure to follow. The wife stood to her husband practically in the condition of a wife having a cause of divorce. He understood that a right and claim for alimony would follow his criminal act, and fraudulently attempted to avoid it by the conveyance of all his property to the orator, cutting off all his wife's right to it in case she obtained a divorce. The conveyance was made expressly to defeat her right to alimony, and was to take effect against her on her obtaining a divorce. The conveyance did not become absolute as against her, and operate to defraud her of her right to alimony until after the cause of divorce actually existed, so that the conveyance must be treated the same as a fraudulent conveyance made after the cause of divorce had accrued. The cause of divorce followed the husband's punishment, and a right of alimony accrued to the wife, as was expected. She asserted her right under the law, and obtained a divorce, whereupon the conveyance of the property to the orator became absolute against her, and a fraud upon her, as it was the consummation of his fraudulent attempt to defraud her of her right to alimony out of his estate. She was as much the victim of his fraud as if the cause of divorce had existed at the time of conveyance, and we

think it clear that the statute (§ 4155) is broad enough to protect her. It protects every person whose right, debt or duty is attempted to be avoided. The language is very comprehensive; and no principle of public policy or construction will exclude from its protection the wife whose right to support and alimony out of her husband's property is fraudulently attempted to be avoided.

It was held in *Beach v. Boynton*, 26 Vt. 725, that although the words "right and duty" are limited to such rights and duties as are of the nature of debts existing *ex contractu*, yet even with that limitation, they are far more extensive in their signification than "debt" in its strict sense.

It is true, no right existed on the part of the wife, or any duty on the part of the husband, which could form the basis of an action at the time of the conveyance; but this was not indispensable. It is not necessary that the right be perfected and due at the time. It is sufficient if there be some inchoate right arising from some contract which may ripen into a debt. It may be contingent to some extent, like the right of a surety against his principal to indemnification before he has made any payment upon the principal's debt, which has been held to be within the evil intended to be remedied by the statute; and the surety has been allowed to stand as one having a debt against his principal from the date of suretyship, though not having paid any thing upon the principal's debt at the time of the conveyance. So in this case the wife's right to alimony was contingent upon the punishment of the husband, her inchoate right of alimony out of his estate existing all the while by virtue of the marriage contract. This contingency was removed, and she became a *quasi* creditor, with a right of action before the conveyance became absolute as against her, and it was void as against her.

To a certain extent the wife, in reference to her claim for support and for alimony, stands in about the same attitude to her husband that a creditor stands toward his debtor; and the statute seems to have been designed for the protection of the wife's rights arising from the marriage contract as well as for the protection of the creditor.

It is settled, as was said in the argument, that the law imposes no restraint upon the husband in the free and unlimited exercise of his right to alienate his personal property at will, and his real estate also, except his wife's homestead right therein, even though in the

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exercise of this right he strips himself of all means of supporting and maintaining his wife, provided he does so *bona fide*, and with no design of defrauding her of her just claims upon him and his estate, the intent in all such cases being the true test of the validity of the transaction. If it be done with a fraudulent intent as to the wife, the transaction is invalid, and she may assail the same under the statute. The intended fraud works the invalidity. *Ricketts v. Ricketts*, 4 Gill, 107; *Feigley v. Feigley*, 7 Md. 537; s. c., 60 Am. Dec. 375; 2 Atk. 62; 2 Roper Hus. and Wife, 14.

The defendant, George W. Folsom, contends that his claim against Josiah W. Seaver in tort (trespass *quare clausum fregit*), for burning his buildings, is within the statute against fraudulent conveyances, and that the conveyance in question was made with intent to defeat his claim for damages. Whether the conveyance was made with that intent or not is largely a question of fact to be found by the master. The master does not so find; nor does he find any facts showing such an intent. He finds that there was no evidence tending to show that Seaver put his property into the hands of the orator to prevent the same being attached by the persons whose buildings he had burned, and that the property was not in such shape that any of it could have been attached by them on writs brought to recover their damages. This finding negatives the fraudulent intent.

It is moreover well settled that Folsom's claim being founded in tort is not within the statute. It was held in *Brooks v. Claves*, 10 Vt. 37, WILLIAMS, C. J., that the word "right," as used in the statute is synonymous with "debt or duty," and does not include a mere right to attach property. In *Beach v. Boynton*, *supra*, REDFIELD, C. J., it was held that the words "right and duty," are limited to such rights and duties as are in the nature of debts, such as exist *ex contractu*, and that it was the purpose of the statute to exclude from its protection rights of the nature of torts, or not to include them. Under a similar statute the Supreme Court of Connecticut held that a voluntary conveyance made with intent to defeat a claim founded on a tort was not within the statute of that State against fraudulent conveyances, as it related only to claims arising out of contracts. *Fox v. Hills*, 1 Conn. 299; *Fowler v. Frisbie*, 3 Conn. 324.

So upon the facts reported as well as the law, the defendant, George W. Folsom, is not within the protection of the statute. The

conveyance is not void as to him, and he cannot assail it. His rights with respect to the property included in the conveyance were affected by it. He cannot treat it as ineffectual and avail himself of the remedies provided by law for collecting his claim out of it as the property of the fraudulent grantor, because the property cannot be treated, as to him, as the property of such grantor. Therefore he cannot hold the funds in the hands of the orator on his trustee writ as the funds of Josiah W. Seaver, nor the two uncollected notes against L. W. Seaver. Neither is the custodian of J. W. Seaver's property, nor his debtor, so far as relates to defendant Folsom.

As the conveyance was void as to the defendant Hattie V. Adams, her rights in respect to the property conveyed, and its avails, were not affected by the conveyance. For the enforcement of her claim for alimony, the payment of which was attempted to be avoided, the property conveyed was still her husband's property, subject to the order and process of court. The County Court in its decree of alimony, properly treated the property conveyed, and its avails, as though such conveyance had not been made. The decree of alimony to the defendant, Hattie V. Adams, by the County Court, included all the funds and property remaining in the hands of the orator in whatever form the same might be. This decree avoided the whole conveyance, and passed the title of the fund remaining in the hands of the orator and the two uncollected notes against L. W. Seaver to said Hattie, and she is entitled to hold the same against the defendant George W. Folsom, and the other defendant. She would also hold the money in the hands of the orator even if Folsom's claim was within the statute; for the decree, and the notification thereof to the orator, established and perfected her right to it before the service of the trustee writ.

The result is that the decree of the Court of Chancery is modified in part and reversed in part, and the cause remanded to the Court of Chancery, with mandate that a decree be made by said court that the defendant Hattie is entitled to all the funds remaining in the hands of the orator arising from the collection of notes transferred to him, and the accumulations thereof, less such disbursements and costs as may be allowed the orator by the court, and also to the uncollected L. W. Seaver notes; that the orator deliver to the defendant Hattie the two uncollected notes against L. W. Seaver, and pay to her the amount of funds in his hands at the

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time of the decree of alimony arising from collections made and all accumulations thereof, including collections since made, if any, after deducting taxes paid thereon, and such costs as may be allowed the orator by the Court of Chancery in this proceeding. If the orator and the defendant Hattie do not agree as to the amount thus to be paid over, the cause to be referred to a master to ascertain and report the amount and decree to be made according to the amount allowed thereon by the court. As the question of costs was reserved in the Court of Chancery no order is made in this court in respect to costs in that court. In this court the orator is not to recover or pay costs; but the defendant Hattie is to recover her costs of the defendant, Folsom, to be taxed and allowed.

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HOLST V. STATE.

(38 Tex. Ct. App. 1.)

Witness — child — inability to comprehend oath.

A child of seven years of age, who does not understand the process of being sworn as a witness, nor the consequences of perjury in this life or after death, is not a competent witness.

CONVICTION of rape. The opinion states the case.

H. J. Huck, Jr., and H. W. Greer, for appellant.

J. H. Burts, assistant attorney-general, for State.

HURT, J. [Omitting other points.] The child was in her sixth year at the time of the alleged assault, and had barely attained the age of seven when offered as a witness. When placed upon the stand, as preliminary to her examination, she was tested as to her competency as follows: "I do not know what the gentleman did (presumably referring to the act of administering the oath) when I held up my hand. I do not know how old I am. I have never been to school. I know my A B C's. I do know where I live. I live here in Beaumont now. Last summer I lived down on the bayou." "When you were on the bayou, did you know how to go around to the neighbor's houses by yourself?" "Yes, sir; I would walk. I would go by myself and would come back by myself." "Do you know

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what would be done with you if you were to tell a story in the court-house?" "No, sir." "Have you been talked to about where you would go if you were to tell a story and be a bad girl and then die?" "I don't know, sir." "Do you see anybody else in the court-house that you know?" "I see cousin Shep; he is standing by that post out yonder. I do not see anybody else I know." The Judge: "If you were to tell a story while in the court-house, it will be very bad, very wrong. If you were to tell a story in the court-house, after being sworn, you might be sent to the penitentiary; or if you were to die after telling a story you might go to the bad man."

Examination resumed by counsel: "I do know Edward; there he sits (points him out)." The Judge: "Cordelia, that is Mr. Leonard. We will be as good to you as we can be. You shan't be hurt. We are good to little girls here. When Mr. Leonard asks you a question, tell him as near as you can answer the question. Answer just as you remember it, and if you do not know, just tell him you do not know. This is Mr. Greer here. When he asks you a question, answer that too."

Our law upon this subject provides that, "children, or other persons, who after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath, are incompetent witnesses." Code Crim. Proc., art. 730.

By reference to the examination above quoted from the record, taken in connection with the child's manner of testifying in her after examination, it is doubtful if she came up to the standard of intelligence demanded by the statute with respect to her ability to relate the transaction. But if this qualification for competency be admitted, she unquestionably fell short in the other qualifications, viz.: that of being sufficiently advanced in intelligence to "understand the obligation of an oath." This fact was impressed upon the mind of the trial judge, as is evidenced by his effort to instruct the witness upon this subject. The evidence quoted shows that she did not know the fact that she had been sworn at all. Her answer was that she "did not know what the gentleman did when she held up her hand," nor, it may be added, was she subsequently informed.

Was the instruction given by the court at the time the witness was placed on the stand sufficient to bring to her mind a realizing sense of the obligation of an oath? Upon this subject Mr. Russell

says: "The effect of the oath upon the conscience of the child should arise from religious (with us, moral) feelings of a permanent nature, and not from instructions confined to the nature of an oath recently communicated to it for the purposes of a trial." Where the child does not appear to adequately comprehend the nature and obligation of an oath, courts have often thought it necessary for the purposes of justice to continue the case, directing that the child should in the meantime be properly instructed. It is in the discretion of the court to continue for such a purpose. And in a case for want of this qualification, the incapacity arising from no neglect, but from being but six years old and too young to be taught this obligation, POLLOCK, C. B., refused to postpone the trial since he "doubted whether the loss in part of memory would not more than countervail the gain in part of religious (moral) education." "Application to postpone in such a case should be made before the child is examined by a grand jury, or, at all events, before the trial is begun; since, if the postponement is after the jury are sworn and the prisoner put upon trial, the judge cannot discharge the jury, but should direct an acquittal (if this be all the evidence); and where the child is incompetent to be sworn, the account of the matter which she has given to others is inadmissible." 3 Russ. Crimes, 612.

"But if the witness be an adult and still does not possess sufficient intelligence to understand the obligation of an oath, it is not proper to postpone the trial in order that the witness may have an opportunity of being instructed upon the subject before the next term, as may be done in the case of a child." 3 Russ. Crimes, 617.

As also bearing upon this subject, *vide Taylor v. State*, 22 Tex. Ct. App. 529; s. c., 58 Am. Rep. 656.

Cordelia Holst being incompetent to testify because not possessing sufficient intelligence to understand the obligation of an oath, the objections of the defendant to the admission of her testimony should have been sustained. For this error of the court below and for that considered in the opening of this opinion, the judgment is reversed and the cause remanded.

Reversed and remanded.

Smith v. State.

SMITH V. STATE.

(28 Tex. Ct. App. 387.)

Criminal law — arson — firing jail.

If a prisoner fires a jail to escape, it is arson.*

CONVICTION of arson. The opinion states the case.

H. W. Kuteman, for appellant.

W. L. Davidson, assistant attorney-general, for State.

WHITE, P. J. Appellant was indicted for, and has been convicted of, arson, the house charged to have been burned being described as "a certain house then and there known as the Parker county poor farm prison, the property of Parker county."

Appellant and two other parties, who had been convicted and fined for misdemeanors, were sent to the poor farm to work out their fines. When not at work they were confined in an iron cage in the prison, which prison was a wooden building. On the day in question, whilst the prisoners were in the iron cage, appellant wrapped some cotton taken from a mattress around a broom handle, ran the same through the bars of the cage into the fire in the fireplace, and, when the cotton was sufficiently ignited, drew it back into the cage, and then ran it through the bars in the top of the cage and held it to the roof of the house, overhead, until the shingles caught fire and were burning—a hole having been burnt through the roof before the same was extinguished by the keeper of the prison. Defendant's intent in setting fire to the house is not positively proven, nor was any thing said by him at the time which tended to show the intent and purpose beyond what his acts indicated. The other prisoners did and said nothing at the time, but as witnesses on the trial denied any complicity in the matter, though admitting that they did not attempt to interfere with or prevent defendant in his endeavors.

There is but a single bill of exceptions in the record, and that relates to omissions in the charge of the court to the jury with

* See note, 20 Am. Rep. 271; *Contra: Jenkins v. State* (58 Ga. 33), 21 Am. Rep. 255, and note, 257.

regard to two supposed essential features of the case, as made by the evidence. It is insisted that inasmuch as the evidence leaves the motive and intent in doubt, and inasmuch as his intent and purpose in setting fire to the building might have been for the purpose of effecting his escape from prison, and not with any other willful or fraudulent intent, the court should have instructed the jury that if escape was the sole object, then defendant could not be convicted. The other objection to the charge is that it failed to instruct the jury upon the law of accomplice testimony, with reference to the evidence of his two fellow prisoners given against him at the trial.

Under our statute arson is the willful burning of any house, and a "house" is any building, edifice or structure inclosed with walls and covered, whatever may be the materials used for building. Penal Code, arts. 679, 680. The burning is complete when the fire has actually communicated to a house, though it may neither be destroyed nor seriously injured; and it is of no consequence by what means the fire is communicated to a house, if the burning is designed. Penal Code, arts. 684, 685.

In his work on Statutory Crimes, Mr. Bishop says: "A jail is held to be an inhabited dwelling-house within the statutes against arson of such houses." Bish. Stat. Crimes (2d ed.), § 207. In *Delaney v. State*, 41 Tex. 601, it is said by ROBERTS, C. J.: "Arson is the willful burning of a house. The house need not be consumed with fire to constitute the offense. It will be sufficient to show that a person set fire to the house to the extent that some part of the house was on fire, unless it is made clearly to appear that it was accidental or was done for some other object wholly different from the intention to burn up or consume the house. If for instance, it appeared from the evidence that a person confined in prison set fire to the door to burn off the lock, so as to make his escape, or that he burned a hole in the floor or in the wall for the same purpose, it would not be arson. So it has been held by the courts of other States. *People v. Cottrel*, 18 Johns. 115; *State v. Mitchell*, 5 Ired. 350.

"If however a prisoner, or a number of prisoners in concert, should set fire to a jail without such definite purpose, but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson."

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In his work on Criminal Law, Mr. Bishop thus discusses the question: "If a prisoner burns a hole in his cell, or otherwise burns the building in which he is confined, not from a desire to consume the building, but to effect his escape, his offense must be, according to the foregoing doctrines, arson; and so it has been held. On the other hand, the contrary has also been held; and unhappily on this side are the majority of cases. One learned judge, after yielding to the authorities which sustain this view, added: 'If however a prisoner, or a number of prisoners in concert, should set fire to a jail without such definite purpose, but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson.' 41 Tex. *supra*. It is difficult to see why this admission should not carry with it the entire better doctrine." 2 Bish. Crim. Law (7th ed.), § 15.

Where the doctrine stated in *Delaney's* case is cited in the text of Wharton's Criminal Law (7th ed.), § 829, the learned author in a note upon the subject says: "But as a jail is a house in the sense in which the term is used in arson, this view cannot be harmonized with other recent cases." See *Com. v. Posey*, 4 Cal. 109; *Stevens v. Com.*, 4 Leigh, 683; *Luke v. State*, 49 Ala. 30; s. c., 20 Am. Rep. 269.

In *Lockett v. State*, 63 Ala. 5, the rule announced is: "If a prisoner confined in a county jail set fire to the building with the intent only to burn a hole through which he may escape, not intending that the building should be further damaged, he is guilty of arson."

In view of these authorities we are of opinion that the doctrine announced in *Delaney's* case, to the effect that if a prisoner willfully fire a jail for the purpose of making his escape, with no design of burning the house down, should be overruled, and the same will be considered hereafter as overruled. Such being our view of the law in this case, it was not error in the learned trial judge to omit so to instruct the jury in this case.

As to the second ground of objection to the charge, we do not think that the testimony adduced establishes the fact that the two State's witnesses who were confined with the defendant in the iron cage at the time of the burning were accessories or accomplices, nor does it make them *particeps criminis*. Concealment of knowl-

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edge that a felony is to be committed does not make the party concealing it a *particeps criminis*, nor necessitate a corroboration of his testimony. *Noftinger v. State*, 7 Tex. Ct. App. 302; *Rucker v. State*, 7 Tex. Ct. App. 550.

Finding no reversible error in the transcript of this case, the judgment is affirmed. *Judgment affirmed.*

HUTTON V. STATE.

(23 Tex. Ct. App. 302.)

Criminal law — assault — school teacher.

A school teacher may moderately chastise a scholar for fighting, against the school rules, although away from the school-house and not in school hours.*

CONVICTION of assault and battery. The opinion states the case.

Ward & Hammond, for appellant.

W. L. Davidson, assistant attorney-general, for State.

WILLSON, J. This conviction is for an aggravated assault and battery. The facts are, substantially, that defendant was a school teacher conducting a school; that the party assaulted, one W. Z. Nugent, a boy nine years of age, was a pupil in said school. This boy fought with other boys, but the fighting occurred away from the school-house, and not during school hours. Among other rules of the school was one prohibiting the students from fighting. When it came to the knowledge of the defendant that this pupil and other pupils had been engaged in fighting, he punished all so engaged for a violation of said rule, by whipping them. He whipped the pupil, W. Z. Nugent, with a switch of reasonable size, and struck him about nine licks on the legs, inflicting no severe bruises, abrasions or other serious injury. These are the facts upon which this conviction is based; and in our judgment they do not sustain the conviction.

Our law wisely provides that the exercise of moderate restraint or correction by a teacher over a scholar is legal — does not constitute an assault or battery. Penal Code, art. 490, subd. 1. It is

* To same effect *Deskins v. Gose* (85 Mo. 485), 55 Am. Rep. 387.

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not shown by the evidence that the correction administered by the teacher to his pupil in this instance was immoderate. It was merely an ordinary whipping with a small switch, such as many parents inflict upon their refractory boys, and such as should perhaps be more common among parents and teachers. That the punishment was inflicted for an infraction of a rule of the school, which infraction was committed away from the school-house, and not during school hours, did not deprive the teacher of the legal right to punish the pupil for such infraction. *Bouldin v. State*, 23 Tex. Ct. App. 172.

Believing this conviction to be contrary to the evidence and the law, the judgment is reversed and the cause remanded.

Reversed and remanded.

FELDER V. STATE.

(23 Tex. Ct. App. 477.)

Criminal law — homicide — evidence — statements of by-standers — dying declarations.

On a trial for murder, a witness was allowed to testify that when he arrived at the place of the homicide, a by-stander pointed to the defendant, whom the witness had just met two doors distant, and said "there is the man who did the shooting." *Held*, error. (*See note*, p. 788.)

To impeach dying declarations the defendant may prove contradictory statements by the deceased.

CONVICTION of murder. The opinion states the case.

Rector, Moore & Thompson, for appellant.

W. L. Davidson, assistant attorney-general, for State.

HURT, J. I. Upon the trial below, the State, over objection thereto by appellant, was permitted to introduce the following testimony: "When you reached the place where the shooting occurred, did any one say who had done the shooting?" "Yes; some one in the crowd pointed out Doctor Felder, and said: 'There is the man who did the shooting.' I had just met Doctor Felder walking leisurely down the street." Other testimony shows that the point at which appellant was met "was about the corner of Kopperl's book store,"

a building situated two doors from that in which the homicide was committed, and at the front of which the latter exclamation was made.

To the admission of this testimony a bill of exceptions was reserved, the exception basing itself upon the proposition that the evidence elicited was hearsay, and not *res gestæ*.

"The question is," says Mr. Wharton, "is the evidence offered that of the event speaking through participants, or that of observers speaking about the event? In the first case, what was thus said can be introduced without calling those who said it; in the second case, they must be called." Whart. Crim. Ev., § 262. To the same effect is the following, from Mr. Bishop's treatise on Criminal Procedure: "But while the declarations and outcries of persons neither on trial nor injured by the defendant's acts may be admissible, to be so such persons must be otherwise connected with the transaction than as mere lookers-on, or the defendant must have been listening, and perhaps under circumstances requiring from him some response." 1 Bish. Crim. Proc., § 1087. Hearsay testimony, as a rule, is admissible to prove no fact which is in its nature susceptible of proof by witnesses testifying of their own knowledge. *Bradshaw v. State*, 10 Bush. 576; *Holt v. State*, 9 Tex. Ct. App. 572; *Means v. State*, 10 Tex. Ct. App. 16; *Shelton v. State*, 11 Tex. Ct. App. 36; *Roscoe Crim. Ev.* 22, 23.

The circumstances of the Kentucky case of *Bradshaw v. State*, *supra*, perhaps present as strong reasons for admitting the declarations of by-standers not connected with the transaction as can easily be conceived. In that case the theory of the prosecution was that defendant had shot deceased with a pistol while on the platform of a railway coach, and thrown the body therefrom, the train at that time being in motion. In support of this theory persons inside the coach and immediately in rear of the platform were permitted to testify to the following exclamations made by persons standing on the platform, and in the immediate presence of the actors: "Bradshaw has shot him!" "Bradshaw has pushed him off!" "Bradshaw has killed him!"

It will be noted that these exclamations were made upon the instant, and presumably in the hearing of the accused. There was in them certainly enough of spontaneity to make them of the *res gestæ*; but they were held inadmissible upon the single ground that the persons making them were in no way connected with the

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main fact. Cases may and do arise in which the exclamations of by-standers, unconnected with the transaction, are admissible; of which the following furnishes an illustration: A. and B. are engaged in a combat. C., a by-stander, cries out, "B. is trying to cut A. with a knife!" In the further progress of the difficulty B. receives injuries at the hands of A. This exclamation is admissible, for the obvious reason that it illustrates A.'s intent, it being presumed that the apprehension of danger thereby created influenced his action, and this whether the information was in point of fact true or false.

Let us however reverse the conditions: Suppose after this exclamation, B., the party whom the exclamation represents as attempting to use the knife, inflicts an injury upon A., and is put upon trial. Here the exclamation is not admissible to illustrate the subsequent act, since this is better illustrated by a physical fact — the act itself — to the commission of which the witness must be called.

If this conclusion be not correct, and it be held that the exclamation was admissible, either to identify the accused, to show flight, or for any other purpose, it will scarcely be denied that the accused must have heard it, and have heard it under circumstances calling for a response, before he could be charged by silence. The burden of showing that the exclamation was heard will, in such case, rest upon the State; and in a majority of cases this can only be done by circumstances, such as contiguity and other opportunities for hearing. But whether shown by proof or by circumstances, the proof that the exclamation was heard by the accused must be the predicate for the introduction of the exclamation itself.

Admitting however that the exclamation was heard by appellant, it becomes a question whether the circumstances required of him a response. According to the testimony, another person accompanied appellant at the time the declaration was made. Was this declaration or exclamation a sufficient identification of the appellant to call upon him for a response? Did the declaration individualize him as even the one of the two persons against whom the charge was made?

But it is insisted by the assistant attorney-general that the appellant is shown to have understood himself to be the person charged, by the fact that when he was being arrested he shot at one of the policemen and snapped his pistol at another. Let us, for the argument, concede that he was being arrested for the shooting of Persons, the deceased, does it follow that this knowledge came to him

from the declarations and acts of by-standers? May he not have first learned this from his being arrested? The arrest, and the acts and declarations of appellant while being arrested are admissible; but this would not render competent the declarations of by-standers that appellant was the man who did the shooting. The statement of facts informs us that "some one in the crowd pointed out defendant and said, 'There is the man who did the shooting.'"

Lewis Morris testified that one or two men passed into the Iron Front saloon, that they were almost running, and somebody said "there goes the man that shot Persons," pointing out appellant. The above is the substance of the testimony on this point. It will be noticed that there is no evidence that appellant saw the party point him out. He may have heard the remark, but there is no evidence that it was he that was individualized; this was not brought home to him, and he may have understood it to apply to the other man who was near him.

As above stated, to entitle the State to introduce the declaration of a by-stander, it must be clearly shown that the defendant understood himself to be accused, and the circumstances must be such as to require from him a response. Now the failure in this case is at the threshold, for it is not shown that appellant, at the time of the remark, knew that he was the man referred to, and hence the declaration cannot be used for the purpose of charging him with that concurrence of circumstances which would call upon him for a response.

Again if the declarations of a by-stander could under any circumstances be used for such purpose, they could not be used for the purpose of proving that the accused did the act charged. This being the case, great circumspection should be used in admitting such declarations, even in cases in which there is strong testimony to show that the defendant knew himself to be charged, and the circumstances are such as to call for a response. Because it is a fact that if admitted, the jury will use for any and all purposes. This devolves upon the court the duty of giving to the jury clear and explicit instructions in confining it to the purposes for which it was allowed. They should be told that those declarations by themselves cannot be used to show that the accused committed the act charged. We are of the opinion that the declarations under discussion were not, under the circumstances, admissible for any purpose.

II. The State having introduced in evidence the dying declarations of deceased, in which the homicide was charged upon appellant, the testimony of the surgeon who saw deceased immediately after he was shot, and who attended him during the period of four or five months that elapsed before his death, was offered to show that deceased declared to him, within twenty or thirty minutes after the shooting, that he did not know who shot him, and that he had made the same declaration on one or two occasions thereafter. On objection by the State this testimony was ruled out, to which exception was taken.

Dying declarations derive their admissibility as evidence from the necessity of the case. They are generally made to friends of the deceased, and under circumstances where the physical conditions and surroundings of the declarant are such that cross-examination is unattainable. Made under a sense of nearly impending death, the awful solemnity of the occasion stamps them with the verity which attends statements made under the sanction of an oath. But the allowance of them is a jealously guarded concession to the ends of human justice. That this is so is evidenced by the requirements as to predicate for their introduction, and also by the limitation upon their admissibility to the identity of the perpetrator and the circumstances of the crime. The oath may be dispensed with, but no circumstances of extremity can compensate the want of a cross-examination. They are themselves hearsay testimony, and as has been said, their admissibility springs out of the necessity of the case. But after admitting them, it would be a perversion of all right reasoning to deny to an accused a like relaxation of the rule, the occasion for it being produced by a coincident and co-extensive necessity. If the State may invoke a departure from the ordinary rules of evidence upon the ground of necessity, would it not be a hardship to deny the same to the accused when the necessity has been put upon him by the concession made to the State?

Statements by the defendant," says Mr. Bishop, "contradictory of dying declarations and contradictions in the latter, may be shown to detract from their weight with the jury." 1 Bish. Crim. Proc. 1209. The same doctrine is asserted in a long line of adjudicated cases. *McPherson v. State*, 9 Yerg. 279; *Moore v. State*, 12 Ala. 764; *People v. Lawrence*, 21 Cal. 368.

In delivering the opinion in the latter case, FIELD, C. J., said: "The rule is general that the credit of a witness may be impeached by proof that he made statements contrary to what he has testified. There is, it is true, a condition to the rule with reference to verbal statements that the attention of the witness must be previously called to the particular occasion and circumstances under which the supposed contradictory statements were made, in order to give him an opportunity of making any explanation of the matter which he may have. But this preliminary condition, it is clear, cannot be complied with when dying declarations are offered in evidence, except in very rare cases. Such declarations are generally made to the physician or friends of the deceased in the absence of the party against whom they are offered, who of course has no opportunity of cross-examination or of directing the attention of the deceased to any alleged contradictory statements made by him. * * * There would be no justice therefore in any rule which would deprive the accused of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause."

The precise question here involved is one of first impression with the courts of last resort of this State. In *Sutton v. State*, 2 Tex. Ct. App. 342, this court held statements contradictory of dying declarations introduced to be, under the circumstances of that case, inadmissible. In that case the dying declarations were introduced by the State, but subsequently, and before the contradictory statements were offered, withdrawn. The point of insistence was that though withdrawn, the declarations necessarily influenced the minds of the jury, and it was for that reason urged that the contradictory statements should be admitted to counteract that influence. These statements being admissible for the single purpose of contradicting the dying declarations, the withdrawal of the latter left nothing to be contradicted, and the contradictory statements stood as naked hearsay, with no reason grounded in necessity to exempt them from the ordinary rule. The reasoning of that decision is not inharmonious with the conclusion here reached. Neither from citations to authorities furnished by the State, nor from our own researches, have we been able to find a precedent for excluding the evidence of statements made by the deceased contradictory of his dying declarations, save in one case in 20 Ohio St.

Ex parte Asher.

We are of opinion that the exclusion of the contradictory statements in this case was error, and that there was also error in admitting the declarations and acts pointing out appellant as the perpetrator of the homicide.

Reversed and remanded.

NOTE BY THE REPORTER.—In *Bradshaw v. Commonwealth*, 10 Bush, 576, the court said: "Contemporaneous expressions or exclamations of the assailant or of his coadjutors, or of the deceased in cases of homicide, may be proved for the purpose of illustrating the character or quality of the act. In the case of Lord George Gordon, the cries of persons constituting the mob by which he was accompanied, and which recognized him as its leader, were admitted to show that his intentions were unlawful and traitorous; but they were held admissible because they were uttered by parties who were themselves participants in the riotous and disorderly proceedings charged to have been instigated by the accused. We are aware of no case in which it was held that the cries or exclamations of persons in no way connected with the main facts were admissible as part of the *res gesta*. If either party is desirous of making available the facts known to such third persons, they must be put upon the witnessstand to prove not what they said at the time of the transaction, but what they then saw or heard. 1 Greenl. Ev., § 108; Roscoe Crim. Ev. 20, 21; Tayl. Ev., § 581."

On a trial for murder, proof of the outcries of another person murdered by the defendant a few minutes before was admitted. *State v. Wagner*, 61 Me. 178.

On trial for assault, proof of the declarations of others of the assaulting party, not on trial, were held admissible. *Blount v. State*, 49 Ala. 381.

EX PARTE ASHER.

(38 Tex. Ct. App. 662.)

Constitutional law — taxation of drummers.

SUFFICIENTLY reported, *ante*. 275.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BALSLEY V. ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD
COMPANY.

(119 Ill. 68.)

Railroads—leased—liability for negligence.

Where a railroad company, with the approval of the legislature, exclusively leased its road to another company for ninety-nine years, and by the lessee's neglect combustibles on the railroad land communicated fire to adjoining buildings, *held*, that the lessor was liable.*

ACTION for injury by fire. The opinion states the case. Judgment for plaintiff at Circuit was reversed by the Appellate Court.

George M. Stevens, for appellant.

John T. Dye, for appellee.

SHELDON, J. This was an action brought by John S. Balsley against the St. Louis, Alton and Terre Haute Railroad Company, to recover damages for the loss, in 1881, of a quantity of hay by fire communicated from a freight engine on defendant's railroad, to and through dry grass and weeds on its right of way.

Section 38, chapter 114, of the Railroad and Warehouse Act, approved March 1, 1874 (Rev. Stat. 1874, p. 807), is as follows: "It

*See to same effect, *Lakin v. Willamette, etc., R. Co.* (18 Oreg. 486), 57 Am. Rep. 35

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shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable to the penalties named" double the amount of damages suffered therefrom. The action was for the breach of this duty. The cause was tried by the court without a jury and judgment rendered in favor of the plaintiff for \$600 and costs, which was reversed by the Appellate Court for the third district, and the plaintiff appealed to this court.

In September, 1867, defendant made a lease of its road for ninety-nine years, to the Indianapolis and St. Louis Railroad Company, a corporation organized under the laws of Indiana, the lease giving to the latter company for that time, upon the terms and conditions therein set forth, the exclusive right to use upon said road any and all locomotives, passenger and freight cars, and all other rolling stock and equipments then belonging to it, and the lessee agreed to indemnify the lessor against all claims for loss and destruction, by whatever cause, of any property whatsoever, while under its control. By an act of the legislature of this State of March 31, 1869, it was provided as follows:

"SECTION 1. That the lease of the St. Louis, Alton and Terre Haute Railroad Company, and the property and road thereof, to the Indianapolis and St. Louis Railroad Company, under which the railroad extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, is now operated, be and stand confirmed according to the terms of said lease: Provided, however, that nothing in this act shall be construed to release the said lessors from any debt, cause of action or contract now existing against them.

"§ 2. The said lessees, their associates, successors and assigns, shall be a railroad corporation in this State under the said style of the Indianapolis and St. Louis Railroad Company, and shall possess the same or as large powers as are possessed by said lessor corporation, and such other powers as are usual to other corporations."

The facts are undisputed, and the only question made is, whether the aforesaid lease and act of the legislature constitute a defense.

It is conceded that by the law of this State, railroad corporations are liable for injuries by the wrongful acts of any lessee or other person, done in the exercise, by its permission, of any of its franchises. But it is insisted that this liability for the acts of others

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is limited to the wrongs done by them while in the performance of acts which they would have had no right to perform except under the charter of the company sought to be made liable, where they are to be regarded, with reference to the public, as the servants and agents of such company; that the act of the legislature here created a new corporation, and conferred upon it franchises which thereby became its own, and independent of the lease, so that the negligence complained of occurred in the performance of an act performed in the lessee company's own right, and not under the charter, nor as the servant or agent of defendant, wherefore there is no ground for its liability; and the case of *West v. St. Louis, Vandalia and Terre Haute Railroad Co.*, 63 Ill. 545, is supposed to sustain this view. That case does point out a distinction as to the liability of a railroad corporation for acts of its lessees or contractors, where the acts are done in the exercise of a franchise granted to the corporation, or are not done in the exercise of such a franchise; but it does not, we think, go to the length of being a warrant for holding the non-liability of the defendant in this case.

The reason for holding a railroad company responsible for the performance of all the duties and obligations imposed upon it by its charter or the general law of the State, while it is being operated by a lessee, does not, we conceive, rest alone upon the narrow ground of the latter being in the exercise of a franchise which belongs to the former, and in so acting, is to be held as the servant or agent of the lessor corporation. In consideration of the grant of its charter, the corporation undertakes for the performance of duties and obligations toward the public, and there is a matter of public policy concerned, that it should not be relieved from the performance of its obligations without the consent of the legislature.

In *Railroad Co. v. Brown*, 17 Wall. 450, it is said: It is the accepted doctrine in this country, that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general law of the State, by a voluntary surrender of its road into the hands of lessees. In *Thomas v. Railroad Co.*, 101 U. S. 83, the language of the court is: "Where a corporation, like a railroad company, has granted to it, by charter, a franchise intrusted, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from per-

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forming those functions— which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes — is a violation of the contract with the State, and is void as against public policy. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature.” *York and Maryland Line Railroad Co. v. Winans*, 17 How. 39. Pierce on American Railroad Law, 244, lays down the rule: “The company cannot divest itself of responsibility for the torts of persons operating its road, by transferring its corporate powers to other parties, or by leasing its road to them in the absence of special statutory authority and exemption. It cannot, by its own act, absolve itself from its obligations without the consent of the legislature. The lessees may however also be responsible for the injury.” In *Ohio and Mississippi Railroad Co. v. Dunbar*, 20 Ill. 623; s. c., 71 Am. Dec. 291, this court say: “This plea presents the question whether an incorporation of this kind (railroad) has the legal capacity to lease its corporate property and franchises so as to be relieved from liability to the public for injuries sustained and damages resulting from breach of contract entered into by the lessee. * * * When these bodies accept their charters, they are held to enter into a contract with the State to discharge all the duties imposed, and to exercise the rights and privileges conferred on them in the manner prescribed; and they must be held to a performance of this contract in precisely the same manner as is required of individuals.” *Singleton v. Southwestern Railroad Co.*, 70 Ga. 464; s. c., 48 Am. Rep. 574, was a case where there had been a lease of a railroad to another corporation, with the consent of the legislature thereto, and an action brought against the lessor to recover for an injury sustained on the lessee’s train. The court say: “But it is said that the Southwestern Railroad Company had the consent of the legislature to lease its road, and having entered into contract with the Central Railroad and Banking Company under that consent, it is absolved from its obligations to the public under its original charter. Authorities are cited to sustain this doctrine. Indeed, some of those hereinbefore referred to are relied upon. The view which we take of the law and the cases cited is, that the original obligation can only be discharged by a legislative enactment consenting to and authorizing the lease, with an exemption granted to the lessor company.” And see 1 Redf. Law of Railways, 590.

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It thus appears, from the authorities cited, that in order to the release of a railroad corporation from the obligations imposed upon it by its charter and the law, it requires exemption therefrom by the legislature. This view we are disposed to adopt, although there may be authorities to the contrary. We find nothing of such exemption in this act of March 18, 1869. There is certainly no express exemption. The first section confirms the lease according to its terms. But the lease contains no exemption. The main purpose of the second section is to create the lessee corporation a domestic corporation, and in doing this, it is declared that the corporation created shall possess the same powers as the lessor corporation. We do not see that this impliedly exempts defendant from any obligation under its charter or the law. It is compatible with the act that such obligation should remain. There is nothing substitutional of one corporation for the other. Nothing is taken from defendant, but the full consideration of its charter remains to it. Under its franchise it has built its road, and it will enjoy the benefit thereof, during the continuance of the lease, in the rental which it will receive. On the termination of the lease by effluxion of time, or forfeiture, the road will revert to defendant.

The reason why freedom from responsibility is claimed for the defendant is, that the lessee, in operating the road, was in the exercise of its own franchise granted to it by the State, and not in the exercise of defendant's franchise, by its permission, and so was not defendant's servant or agent. We do not accept this as the only ground of liability, as is thus intimated. Above this are the charter obligations for the performance of its duties toward the public, which defendant assumed. The interest of the public requires the continuance of these obligations, and we are of opinion they should be held to remain upon the defendant.

The judgment of the Appellate Court will be reversed, and the cause remanded to that court, with direction to affirm the judgment of the Circuit Court.

Judgment reversed.

MATTER OF SWIGERT.

(119 Ill. 88.)

Railroads—exemption from taxation—elevator leased to private parties.

A railroad company built on its lands a grain elevator, and leased it to private parties, who used it in the company's business, but received the tolls and compensation for themselves. *Held*, not exempt from taxation as property or "accommodations necessary to accomplish the objects of its incorporation."

QUESTION of exemption from taxation. The opinion states the case.

George Hunt, attorney-general, for the auditor.

Green & Gilbert, for the Illinois Central Railroad Company.

MULKEY, J. The question for determination in this case is, whether a certain grain elevator belonging to the Illinois Central Railroad Company is exempt from taxation for other than State purposes. The elevator in question is built on the banks of the Ohio river, on a lot of ground belonging to the company, within the corporate limits of the city of Cairo, and is known as the "Cairo elevator." It is within about fifty feet of the main track of the company's road leading into the city, and is connected therewith by side-tracks. It is so constructed as to receive and discharge grain both by rail and river, though much the largest portion of its business is done by rail. It was completed by the company in the fall of 1881, and about a year afterward was let by the company to the Halliday Brothers, who have had exclusive control of it ever since. The rental or compensation which the company receives for the use of it, is regulated by the amount of business done, that is, the company is paid by the lessees a specified sum for each bushel of grain received into it. Just what this sum is, does not appear from the evidence. The Halliday Brothers charge a cent and a half per bushel for the storage of grain, and permitting it to remain in the elevator for a period of ten days or less, and an additional half-cent per bushel for every additional ten days it remains therein. The building has a capacity of 750,000 bushels, and the grain is stored therein according to grade, and not according to ownership. It cost some \$200,000 or \$300,000.

Henry S. Halliday, one of the lessees, and Horace Tucker, general freight agent of the company, were both examined as witnesses on behalf of the appellant. These witnesses concur in the opinion that the Illinois Central Railroad Company could not do the amount and character of grain business now done by it, without an elevator, and they therefore conclude, and so state in their testimony, that such an elevator is necessary to a successful and complete operation of the company's road in the transaction of its grain business. If the conclusion to be reached depended alone upon the opinions of witnesses, we should not hesitate to reverse the judgment of the county board for holding, as it did, the property was subject to local taxation. But clearly, these opinions are not conclusive, nor can they have any thing like a controlling influence in the decision of the question. What constitutes an exemption from taxation is a question of law, but whether a particular piece of property is within the exemption or not, depends upon the existence or non-existence of certain facts capable of proof, which of course is matter for the determination of a jury, or trying tribunal performing the functions of a jury, as was the case here. When the relations of the property to the road, and the uses to which it is applied, are ascertained, it then becomes a question of law whether it is exempt or not. In reviewing this case we must pass upon the facts as well as the law, and from the facts proved must determine the true relations of the property in question to the road and its operation, rather than from the opinions of witnesses.

The power to raise money by taxation is universally admitted to be inherent in every State or sovereignty, since without it, the necessary means of defraying the expenses of government could not be provided, except in the case of mere despotisms. As this right of taxation then is inherent, and essential to the very existence of government itself, the principle is universally recognized by courts and political writers, that the State cannot wholly barter it away or otherwise dispose of it. And even a partial disposition of it has been admitted by the courts with great hesitation and reluctance. *Cooley Const. Lim.* 281. It is obvious that all laws exempting property from taxation are not only restrictions or limitations on the taxing power, but they necessarily result in an unequal distribution of the burdens of government. The effect is not only to relieve the property exempted from the payment of its due proportion of taxes, but that which it ought to pay, and would pay, under

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an equal and fair apportionment of them, must also be collected from the property not exempted. These considerations have very properly induced courts to adopt what is known as a strict construction, in giving effect to such laws, hence nothing will be held to come within the exemption which does not clearly appear to be so, and all reasonable intendments will be indulged in favor of the State. Presumably all property is subject to taxation. When therefore it is claimed that a particular piece or class of property is exempt, the party interposing the claim must come prepared to establish it by clear and satisfactory proof. Thus it is said in the case of *People v. Graceland Cemetery Co.*, 86 Ill. 336: "The true spirit of our laws requires that all property should bear its just proportion of the burden of taxation, and where an exception is made in favor of a corporation, justice demands that it should show clearly a compliance with the terms and spirit of the act exempting it from taxation before it can be permitted to escape a duty incumbent equally upon every citizen." The general principle here announced is also recognized in the following cases decided by this court: *First M. E. Church v. Chicago*, 26 Ill. 482; *Pace v. County Com'rs of Jefferson County*, 20 Ill. 644; *People v. Western Seamen's Friend Society*, 87 Ill. 246; *Huck v. Chicago & Alton R. Co.*, 86 Ill. 352.

In the present case, it is claimed that the elevator in question is exempt from taxation under the twenty-second section of the company's charter, which will be found in the Private Laws of 1851, page 72. That section, after exempting from taxation the lands granted to the company by the State, until they are sold, and also the "stock, property and effects of the company" for six years from the date of the act, directs that thereafter "the stock, property and assets" belonging to the company shall be assessed and taxed, to a limited extent, for State purposes. It then declares that "the said corporation is hereby exempted from all taxation of every kind, except as herein provided for." It must be conceded, the language of this section is very broad, and if considered without reference to the objects and purposes of the act, it is clearly broad enough to include the property in question. Indeed if the provision is to be construed independently of this consideration, and is to be enforced according to its literal terms, it would include any kind of property whatever; and yet no one, we presume, would take so extreme a view as that. It is very certain the learned counsel for the company do not.

It does not appear from the evidence, nor is it claimed, that the land upon which the elevator is built is a part of the original grant by the State to the company, and hence the exemption cannot be placed on that ground. The company however is authorized by the first section of the charter "to purchase, hold and use all such real estate and other property as may be necessary for the construction of its railway and stations, and other accommodations as may be necessary to accomplish the objects of its incorporation;" and the contention of appellant, as we understand is, that the property in question falls within the general description in the concluding part of the section, namely: "other accommodations," etc., and that it is therefore exempt from taxation. This conclusion is based upon the assumption that the exemption is co-extensive with the right to acquire or hold property of any kind. This position we do not regard as sound. But conceding it is for the purpose of the argument, it does not necessarily follow that the construction relied on is the correct one. We cannot believe it was intended by the general description mentioned, to include objects of a different kind or class from those specifically mentioned in the preceding part of the section. It is a well-settled doctrine, that in construing statutes, particularly those requiring a strict construction, as is the case here, a general description, like the one in question, following a specific enumeration of objects or things, will be held to include only such things or objects as are of the same kind as those specifically enumerated. Applying this principle to the section cited, as we must, so far as the question of exemption is concerned, we see nothing in it which strengthens the claim of the company. By it, the company is authorized "to purchase, hold and use all such real estate and other property as may be necessary for the construction of its railway and stations, and other accommodations," etc. Under the rule of construction in question, whatever is included in the expression, "other accommodations," must be of the same class or kind as "railway and stations." Without at all attempting to state the various articles or subjects of property that would clearly belong to the class of things specifically enumerated, we would say that it doubtless includes the road, with all necessary switches and turn-outs, together with all structures thereon; also rolling stock, with all its machinery and appendages, warehouses and other structures, at the *termini* or along the line of the road, belonging to the company, and used

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by it exclusively for the reception of passengers, the storage of freight, and also for the purpose of keeping the road and rolling stock in repair, or of improving their general condition. This of course would include all necessary depot grounds and buildings, machine and work shops of all kinds, machinery, tools, and implements of every description used in keeping the road and rolling stock in repair and in a good and safe condition. All these things, it will be perceived, have an immediate connection with the improvement and operation of the road. Whatever would be necessary to increase its capacity, such as laying down an additional track or increasing the amount of rolling stock, would fall within the same category. But it is evident this elevator does not belong to any of the classes of things enumerated. It has no direct connection with the road or its operation, yet when shipments of grain are made, either to or from it, over the company's road, it is very clear the company can handle the grain thus shipped, with more ease and greater facility, and hence can, by means of it, do a greater amount of business. But this is purely incidental, and falls far short of establishing the proposition that a vast elevator like this, costing \$200,000 or \$300,000, is a necessary appendage of a railroad, or that the legislature, in granting the company's charter, intended to exempt such a structure from taxation. It is clear, the advantages accruing to the company, as shown by the evidence, do not at all result from its ownership of the property. Had the elevator been built and operated in the same manner it now is, by some one other than the company (for instance, the Halliday Brothers), the company, so far as facilitating its business as a common carrier is concerned, would derive the same benefit from it that it now does. As a mere carrier, the company has no right to put a bushel of grain in it, except when directed to do so by the shipper or consignee. This necessarily results from the fact that all grain, as is shown by the testimony, is stored in it according to grade, and not according to ownership. As to a railway warehouse, properly so called, the rule and usage is altogether different. On the arrival of a consignment of goods, the company has the right to at once store them in its own warehouse. The company is bound to carry grain in bulk, and deliver the same from cars or other convenient place of storage, without extra charge, now just the same as it was before the elevator was built, if so required; and the company has no right to mix

one man's grain with others, unless permitted to do so by the owners.

It is clear therefore outside of the incidental benefits resulting to the company from a law of business, rather than from any municipal regulation, the elevator has no necessary connection with the construction, maintaining or operation of the company's road, and such being the case, it clearly does not come within the exemption. If the elevator was used exclusively by the company in receiving grain for shipment, or for storing it after shipment, without any additional charge therefor, except where the owner neglected to take it away within a reasonable time after its arrival, the property would then be clearly exempt from taxation. But such is not the case. Buildings used for the storage of grain for compensation are indifferently called warehouses, granaries, and elevators. Vast amounts of capital are invested in them, and like railroads and other *quasi* public property, are under legislative control. Their construction and operation constitute a distinct business in the State, of vast magnitude. They are a great convenience to the community in which they are situated, and particularly to the owners of the railways with which they are almost universally connected. Capitalists invest money in them for the same reason they do in other things—because they think it will pay. They are supported by contributions from dealers in grain, in the shape of tolls, which are always taken into account in buying and selling, hence the consumer in the end pays these expenses or contributions. So in this case, the building of the elevator was a mere investment by the company, and it is now regularly collecting tolls from those who use it through the Halliday Brothers. These tolls, thus collected, are simply the returns of the company's investment. It is not reasonable to suppose the legislature intended that property representing so large an amount of capital should be exempt from local taxation, when the people at large are thus taxed for every benefit derived from it.

But this is not a new question in this court. We regard the case of *Illinois Central R. Co. v. Irvin*, 72 Ill. 452, as an authority directly in point against the claim of the company in this case. There it was claimed that a transfer boat belonging to appellant was, under the provisions of its charter now under consideration, exempt from local taxation. The boat in question was used by the company in carrying passengers and freight between Cairo and

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Columbus, Kentucky, thus forming a connecting link between the Illinois Central and the Mobile and Ohio railroads. This court, in rejecting the claim of appellant in that case, and in giving a construction to appellant's charter, used the following language: "The taxes from the payment, of which the legislature intended to relieve appellant, could have been only the taxes which as a railroad corporation it would be otherwise liable to pay upon its property acquired in the prosecution of its business in constructing and operating those lines of road. The elevator clearly does not fall within the exemption, according to the rule here laid down.

It is therefore considered that the decision of the county board of Alexander county be affirmed.

Order affirmed.

CITY OF EAST ST. LOUIS V. O'FLYNN.

(119 ILL. 200.)

Eminent domain — vacating streets.

A lot-owner in a city may not maintain an action against the city for vacating a street not bordering on his lot nor necessary for access thereto, for the purpose of devoting it to a railway.

ACTION for damages to land. The opinion states the case. The plaintiff had judgment below.

Geo. Pollard and Geo. F. O. Melveny, for appellant.

J. M. Freels and L. H. Hite, for appellee.

SCOTT, C. J. This action was brought in the City Court of East St. Louis, by James O'Flynn, against the city of East St. Louis, to recover damages alleged to have been occasioned to a lot of ground owned by him, by the wrongful conduct of defendant. It is recited in the declaration, defendant is an incorporated city, and had exclusive control of certain streets within the corporation limits, viz.: Trendly street, Church street and Pratt street, running at right angles with the Mississippi river on the eastern bank, and from thence eastward to the old bed of the river, near the mouth of Cahokia creek, and also Front, Second, Third and Fourth streets, running parallel with the river and with each other, and also all

alleys lying within the district bounded by the streets named ; and the duty of defendant to keep such streets and alleys open, clear of obstructions, and in good repair, for the use of the inhabitants of the city and adjacent owners, is then averred in the usual ample form. It is further set forth that plaintiff is the owner and was in possession of lot 9, in block 28, of the Ferry division, fronting west on Third street, and east on a thirty-foot alley, on which there is a frame dwelling-house, with out-buildings and other valuable improvements, and by way of a breach of duty on the part of defendant, it is then averred the city, by an ordinance entitled " An ordinance vacating certain streets and alleys lying between Front street and Fourth street, seventy feet northwardly therefrom, and Church street in Ferry division," authorized the Cairo and St. Louis Railroad Company to take possession of all that portion of said streets and alleys lying between Front and Fourth streets and a line parallel with Trendly street, and seventy feet northwardly therefrom, and the entire length of Church street, and permitted the railroad company to make a certain use of the land lying within or bounded by the streets named, all of which alleged wrongful acts, it is averred, injuriously affect plaintiff's property.

Section three of the ordinance referred to in the declaration, and given in evidence by plaintiff, is as follows : " That all streets and alleys lying between Front and Fourth streets, and between a line running parallel with Trendly street seventy (70) feet northwardly therefrom, and Church street, of said Ferry division, be and the same is hereby absolutely vacated." The other sections of the ordinance prescribe the terms and conditions upon which the railroad company may occupy and improve the lands adjacent to the streets and alleys vacated, and including of course the streets and alleys; but in the view it is thought should be taken of the case, it will not be necessary to state their contents in detail.

Only the general issue was pleaded by the defendant, and on the trial of the cause the jury found the issues for plaintiff, and assessed his damages at \$850. The judgment rendered upon the verdict was affirmed in the Appellate Court for the fourth district, and a majority of the judges of that court having made the proper certificate to enable it to do so, defendant brings the case to this court on its further appeal.

There is no suggestion the streets and alleys mentioned in the ordinance were not legally vacated. No one makes any complaint

on that score. Plaintiff's lot is situated in another block. Although the lot in controversy fronts on Third street, it is some distance from that part of Third street that is vacated by the city ordinance. The only question that can be considered in this court is purely a question of law. It is, can defendant, as a matter of law, be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and Fourth streets, the vacation being in another block in the city than that in which plaintiff's property is situated.

Much of the argument in support of plaintiff's right to recover in the case proceeds on the erroneous assumption the property has been "taken or damaged" for public use, and is therefore within the constitutional provision that "private property shall not be taken or damaged for public use without just compensation." The proposition as formulated by counsel is, this property has been so damaged, and to the extent of this injury it has not only been "damaged," but "taken," within the strict letter and spirit of this provision of our Constitution. The difficulty is, the position taken on this branch of the case has no support in any thing contained in this record. It is not true, in fact or in law, that defendant has either taken or damaged plaintiff's property for "public use." It has taken no property for public or any other use. That of which complaint is made is vacating certain streets. In no sense can that act be construed as either taking or damaging private property for public use, as those terms are used in the Constitution. It is true, the vacating ordinance contains many provisions, and perhaps a contract between the city and the railroad company, in relation to the use to be made of the vacated streets and alleys, and the land owned by the railroad company that abutted on such streets and alleys; but that fact does not at all aid plaintiff's right of recovery in this action, if the streets and alleys were legally vacated, as they seem to have been.

It therefore seems plain, if plaintiff can recover at all, it must be under that provision of section 1 of the act in force July 1, 1874, in relation to "vacation of streets, alleys and highways," which provides, "when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law." The rule of law on this subject was stated by this court in *City of Chicago v. Union Building Association*, 102 Ill. 379, where it was said, for any act obstructing a public and com-

mon right no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree. Accordingly, on the authority of that case, it was held in *Littler v. City of Lincoln*, 106 Ill. 353, the rights or privileges of other proprietors in the plat, which the statute protects, are necessarily legal rights and privileges, and such parties cannot therefore be affected by the closing of streets not adjacent to their property, nor directly affording access thereto and egress therefrom. The facts of the case being considered bring it precisely within the principle of the cases cited. Here, plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the "same kind" of damage that would be sustained by all other persons in the city that might have occasion to go that way, and although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action. The court very properly instructed the jury, for defendant, "that for the vacation mentioned in that ordinance, the defendant is not liable to plaintiff for any consequential damage that may have resulted to his lot therefrom, and defendant is not liable, in this action, for any thing alleged in the declaration in this case done by the St. Louis and Cario Railroad Company, which said company was not authorized to do by said ordinance."

Leaving out of view all that is alleged to have been done by the railroad company that affects plaintiff's property, as the jury were instructed to do, there remained no ground of recovery against the city for any thing it had done in vacating streets and alleys in a part of the city away from plaintiff's property. Whatever, if any, damage he may have sustained by reason of the vacation of such streets and alleys, it was the "same kind," although it might have been in a greater degree, as that sustained by the general public; and the law seems to be well settled, in this State at least, by the cases cited, that for such damage a party can have no action. In the view taken of the law as applicable to the facts, the court ought

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to have excluded, as it was asked to do all the evidence in the case, and instructed the jury to find a verdict for defendant.

The judgment of the Appellate Court will be reversed, and the cause remanded to the City Court of East St. Louis.

Judgment reversed.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY V. AMERMAN.

(119 Ill. 329.)

Insurance — waiver of condition by accepting premium — conditional acceptance.

An insurance policy was conditioned to be void if the insured should engage as a railway brakeman, or in switching or in coupling or uncoupling cars. Consent was refused to engage in such business, and the agent advised the insured to obtain an accident policy, and to keep up the policy in question so that it might be good when he ceased to be employed in that business. He paid a premium while he was a brakeman, the agent then informing him that if he was killed while braking on a train the policy would be void, but if he died in any other way it would be valid, and he replying that he would pay with that understanding. *Held*, that evidence of the foregoing circumstances was admissible to show that the condition was not waived.

ACTION on a life insurance policy. The opinion states the case. The plaintiff had judgment below.

Cratty Bros., Fuller & Gallup and Miles A. Fuller, for appellant.

S. S. Page, for appellee.

SHOPE, J. On the 11th day of February, A. D. 1882, the Northwestern Mutual Life Insurance Company issued a policy upon the life of David A. Amerman, in the sum of \$1,000, payable at death, to appellee, his wife. The policy provided for the payment of semi-annual premiums by the assured, on or before noon of the 11th day of the months of February and August of each year, and contained the conditions, among others, that if the premiums should not be promptly paid when stipulated, and "if the said person (the assured) should be personally engaged * * * as engineer or fireman of any locomotive engine, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping car conductor, mail agent, express messenger or baggage master, * * * without in each

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or either of the foregoing cases, having first obtained the written consent of the company, * * * then, and in every such case, this policy shall be null and void." The assured, at the time of issuing the policy, was a clerk in the office of the Wabash railway company, but shortly afterward went upon that railroad in the capacity of brakeman, and was subsequently promoted to the position of conductor of a freight train. It appears, from the evidence that part of his duty as such conductor was to couple and uncouple cars of his train, and while thus engaged on the morning of the 11th day of February, 1883, he was caught between the ends of projecting timbers with which the cars were laden, and so injured that he died at eight o'clock A. M. of that day. The consent of the company to his entering upon the prohibited employment had not been obtained. After engaging in the employment of braking, the assured wrote to the State agents of appellant, advising them that he was so engaged temporarily, while expecting something better, and asking them what change would be necessary in his policy, if any. This was on the 20th day of April, 1882, and on the 1st day of May these agents replied as follows:

"CHICAGO, ILL., May 1, 1882.

"D. M. Amerman, Esq., 309 Maple St., Peoria, Ill.:

"DEAR SIR—Your favor at hand. I am sorry the company will not issue permit for your present business. Let me tell you what to do. Take out an accident policy for six months or a year. In the meantime you may quit braking, when our policy would be good. The accident policy pays you in case of death by or resulting from accident, and pays you a weekly compensation while you are laid up. You cannot probably get a life policy in any first-class company for your present business. The accident policy will not cost you a large amount, and when you quit braking you will have our policy, which is as good as you can get.

"Mead & Dexter of this city have a good accident company. I will have them write you. Yours,

"DEAN & PAYNE."

It is obvious that the assured, by entering into this employment, committed a breach of the condition of the policy, and it is not claimed that the company is liable unless it has waived the condition, or has done some act that will estop it from interposing the breach of the condition as a defense. The acts and declarations of the company

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relied upon as estopping the company from setting up a breach of the condition mentioned as a defense to this action, occurred after the receipt by the assured of said letter from Dean & Payne, and are, in substance, that on the 1st day of July, 1882, the company sent a notice to the assured that a semi-annual premium on his policy would be due on the 11th day of August following, at noon, and unless the same was paid the policy would be subject to forfeiture therefor, etc., and containing the statement, among others, that "members neglecting to pay are carrying their own risk; agents have no right to waive forfeitures; * * * prompt payment is necessary to keep your policy in force." That before noon of August 11, the assured paid the premium, and received from the company's agent the following instrument:

NORTHWESTERN MUTUAL LIFE INSURANCE CO.

HOME OFFICE, MILWAUKEE, WISCONSIN.

| | | | |
|--|---------------|---|--|
| Premium | \$12 47 | For terms of mutual agreement see policy. | Policy No. 112,006, insuring the life of |
| Loan | 3 11 | | |
| Premium for six months | <u>\$9.36</u> | | <i>David A. Amerman,</i> |
| <hr/> | | | |
| Premium as above, received this 11th day of August, '82. | | is hereby made binding for six months, from the 11th day of August, 1882, provided payment as per margin is made in due time, and the receipt is countersigned by I. N. Feger, Agt., Peoria. This payment and receipt shall not have force or effect to continue the policy beyond the period above stated. | |
| I. N. FEGER, <i>Agent.</i> | | | <i>J. W. SKINNER, Secretary, Ill.</i> |

And that afterward, on the 1st day of January, A. D. 1883, a like notice, in all respects, as that of July 2, was sent to assured, notifying him of the semi-annual premium falling due February 11, 1883. These facts are properly replied to the plea of the company setting up the breach of the condition in the respect named, as a defense.

In the court below, appellant company contended that the assured paid the premium with full knowledge that the company would not carry a policy on his life during his continuance in employment in the capacity of brakeman, etc., and that he made the payment in accordance with the suggestion of the letter of the State agents,

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for the purpose of preventing the lapsing of his policy, and for no other purpose, and that the company was not therefore estopped by the acceptance of the premium. At the trial to maintain this contention, it puts its local agent, Feger, upon the stand, who among other things testified: "Am agent for defendants; knew Mr. and Mrs. Amerman; became acquainted with them about the date of this policy; David A. Amerman paid all the premiums that were paid upon such policy; the date of the policy was the first one, and the second on August 11, following.

Q. "State what explanation, if any, you gave Mr. Amerman at the time of delivering this last receipt to him, in reference to it. (Objected to; objection overruled.)

A. "Well, I told him that if he got hurt while braking on the train, his policy would not amount to any thing; but if he should die in any other way, he could collect his policy, and I guess he got the same from the company. He had written to the company before he came to me.

Q. "What reply did Mr. Amerman make to that, if any? (Objection by plaintiff; objection overruled.)

A. "Well, he said he would pay it that way — with that understanding — which he did.

Q. "Was there any thing else said at that time, that you recollect of, as explanatory of your question or his answer?

A. "I don't know as there was."

On motion of appellee, the court excluded from the jury the three foregoing questions to, and answers of the witness, and the defendant, by its counsel, excepted.

It also appeared that the assured, at the time of his death, had an accident policy of \$1,000 upon his life, but when the same was taken out does not clearly appear.

It is contended by appellee, that the company, having received the premium with full knowledge of the breach of the condition of the policy, is estopped from insisting upon such breach as a defense. It has been repeatedly held, in this State and elsewhere, that the receipt of the premium by the insurer, after knowledge that the condition of the policy had been broken, would amount to a waiver of the condition. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; s. c., 4 Am. Rep. 582; *Reaper Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230. An examination of the cases so holding however will, it is believed, show that the assured,

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in each case, in paying the premium, was induced to do so relying on the validity of his policy, and that the act of the company therefore, in receiving the premium, would estop it from setting up the forfeiture. In *Commercial Ins. Co. v. Spankneble, supra*, the company sought to interpose, as a defense, facts constituting a breach of a condition of the policy, which were known to its agents to exist when the policy issued, and the court says: "To permit the company, when the omission was by their own agent, to now avoid the payment of the loss, * * * would amount to a fraud. * * * It would be a fraud to permit the company to receive the premiums when they knew that the policy was not binding, and which they never intended to pay."

Conditions like those under consideration are inserted in the policy for the benefit and protection of the insurer, and may be waived either before or after breach thereof, and when the agent of the company through whom it must act in dealing with the public, knowing of the right of forfeiture, permits the assured to pay the premium to the company, he relying on his policy as valid and subsisting, the company will be held to have waived the condition. It would be grossly inequitable to permit the company to receive the premium from an assured, who was induced thereby to rely upon his policy for indemnity, and then insist upon a forfeiture from facts known by it to exist when the premium was paid. This we understand to be the rule laid down by text-writers, and supported by the adjudicated cases. May, in his work on Insurance, page 507, thus states the rule: "An estoppel arises when the insurer, having knowledge of the facts to which he has the right to take exceptions, or which constitute a defense against any claim under the policy, if he chooses to avail himself of them, so bears himself thereafter in relation to the contract, as fairly to lead the insured to believe that the insurer still recognizes the policy to be in full force." It is to be observed that it is the effect upon the insured that gives vitality to the estoppel, rather than the purpose or intent of the insurer, and unless the conduct of the insurer has in some way misled the assured, or induced him to do some act or neglect to do some thing to his prejudice, in reliance upon the acts or declarations of the insurer, there can be no estoppel. May on Insurance, *supra*. It is said by this court: "The doctrine of *estoppel in pais* is based upon a fraudulent purpose or fraudulent result. If therefore the element of fraud is wanting, there is no estoppel, as

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if both parties were equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other, he acting solely upon his own judgment. There must be deception and change of conduct in consequence." *Davidson v. Young*, 38 Ill. 152. Again it is said: "There must be a change of conduct, induced by the act of the party estopped, to the injury of another, in order to prevent him from showing the truth. If the element of fraud or injury is wanting, there is no estoppel." *Flower v. Elwood*, 66 Ill. 447; *Powell v. Rogers*, 105 Ill. 318.

There can be no fraud if the parties to the transaction are equally informed of all the facts, and act independently upon such knowledge equally possessed by both parties. Nor can it be said that one party has been misled or induced to do an act by the conduct or declarations of another, when there has been no suggestion of falsehood or suppression of the truth, by silence or otherwise, and the party acts, after full knowledge, upon his own judgment or according to his own inclination. If as before substantially stated, the assured paid the premium under the belief, fairly induced by the acts and declarations of the agents of the defendant company, that the policy was to be in force while he continued in the prohibited occupation, the acceptance of the money by the company would estop it from insisting upon the condition of the policy as a defense. The mere act however of receiving or collecting the premium, by the insurance company, with knowledge of an existing right of forfeiture, has, so far as we know, never been held to estop the company from setting up such forfeiture, if the assured had no reason fairly to conclude, from the acts and declarations of the company, or its agents, that the forfeiture had been or would be waived, when he made the payment of the premium, or unless the payment was made in reliance upon the validity of his policy, induced by the acts, declarations or silence of the company. If the assured knew or understood that the company intended to insist upon the forfeiture for breach of the condition of the policy under consideration, if he came to his death by reason of or while in an employment in violation of such condition, and with such knowledge, for the purpose of keeping his policy from lapsing for non-payment of the premium, so that it might be in force after he should quit such employment, as suggested by the company's State agents, or for any other reason he might deem to his advantage, paid the pre-

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mium, the company might rightfully accept it for the purpose for which it was paid, without being guilty of fraud in setting up the breach of such condition, which it never consented to waive, and which the assured knew it intended to insist upon. Manifestly then it was material to the inquiry to know whether the payment of the premium by the assured, August eleventh, was made relying on the validity of his policy, induced by the acts or declarations of the appellant company, or whether he knew that the company intended to insist upon the condition of the policy if death ensued in consequence of his employment. It might be greatly to his advantage to suspend the force of his policy temporarily, while so engaged, and revive it when the necessity for such employment ceased. It not unfrequently happens, we presume, that it is necessary or desirable for persons having life insurance, to engage temporarily in some occupation, or travel for business or pleasure in latitudes, prohibited by their policy. In this case the assured wrote to the State agents that he had entered the employment on the train temporarily, while waiting for something better, and was promptly informed by the company, through these agents, that the company would not carry the risk while he was so engaged.

If the position contended for by appellee is correct, then it follows that the insurance company, though acting in the utmost good faith, could not receive the premium at the request of the assured and for his benefit, with full knowledge on his part that the company would not carry a policy on his life or waive its right of forfeiture while the prohibited occupation continued, without being estopped from asserting its rights of forfeiture if death ensued from such employment. It would follow, that if the assured, from necessity, or because he might find it profitable or desirable, engaged temporarily in an occupation, or travelled in a latitude not permitted by his policy, there is no alternative, he may not pay his premium to prevent his policy from lapsing from non-payment of premium, and thereby keep his policy in condition to revive when he resumes an insurable occupation, or returns to a locality in which by the terms of his policy he is permitted to reside, but he must permit the policy to lapse, and re-insure when the temporary prohibited occupation or residence has ceased, if he desires so to do and remains insurable, at such increased rate of premium as his increased age may demand. We are not prepared to so hold.

It follows therefore that the evidence of the witness Feger, as it tended in some degree to show for what purpose the premium was paid, and whether or not the insured relied upon his policy as valid and subsisting insurance while he was engaged in braking on the trains of a railroad, was improperly excluded by the trial court. All the facts and circumstances attending the payment of the premium and illustrative of the acts of the parties in respect thereto, were, we think, pertinent to the issue made by the pleadings, and under proper instructions should have been submitted to the jury.

It is said in argument, that the evidence shows that Mrs. Amerman, plaintiff, paid the premium of August eleventh, in the absence of her husband. That may be true, yet the whole evidence on that subject should have been submitted. The questions of how much the proposed evidence establishes and of the credibility of the witnesses, are for the jury. If the evidence tends to prove any matter material to the issue it is admissible.

It is also contended that the receipt given is a new contract extending the insurance six months from its date. This we think is a misapprehension. It will be found, upon examination of the policy, that this receipt is issued under the third condition of the policy, and in pursuance thereof. No new contract of insurance was made or intended to be made. The only office of the receipt was to acknowledge the payment of the premium as required by the terms of the policy, and avoid the effect of the condition forfeiting the insurance for non-payment of the premium. *New England Fire and Marine Ins. Co. v. Wetmore*, 32 Ill. 242; *Herron v. Peoria Marine and Fire Ins. Co.*, 28 Ill. 235; s. c., 81 Am. Dec. 272.

This view will also dispose of the contention of appellee that the parol evidence offered and excluded, as before mentioned, would have the effect to alter or vary a contract in writing, and was therefore inadmissible. The receipt, with evidence of contemporaneous acts and declarations, should go to the jury under proper instructions as to the weight and effect to be given thereto.

After what has been said no extended discussion of the instructions complained of will be required, as no doubt upon another trial they will be made to conform to the views here expressed.

The first and second instructions given for appellee informed the jury, in substance, that if after the assured was engaged as a brakeman on the trains of a railroad, the appellant company, with notice of that fact by its agents, wrote the letter of May first, and afterward

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notified assured to pay the premiums on his policy and collected and received the premium thereafter accruing, and gave assured the receipt mentioned with knowledge that assured was so engaged and employed, then the jury would be justified in finding that the appellant company, by its acts, had waived the forfeiture provided for in said policy in case of such employment, thereby in effect instructing the jury that the acts and declarations enumerated, as a matter of law, estopped the company, whether the assured had been misled to his injury thereby or not, or whether or not he had been induced, by the acts and declarations of the company, to pay the premium, alter his position in respect to the insurance, or take or neglect to take some other action in relation thereto to his prejudice, relying upon his policy as valid and binding while he was so employed. These instructions, in this respect, were erroneous.

For the errors indicated, the judgment of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court of Peoria county for further proceedings.

Judgment reversed.

INTERNATIONAL BANK V. JONES.

(119 Ill. 407.)

Banks — partner making individual deposit — bank owning partnership debt — set-off.

A bank may not set off an individual deposit against a partnership debt, and the partner may lawfully appropriate such deposit to a *bona fide* creditor by check.

ACTION on a check. The opinion states the case. The plaintiff had judgment below.

Rosenthal & Pence, for appellant.

J. K. Boyeson, for appellee.

SCHOLFIELD, J. John D. Oakford and Frederick H. Thomas were partners under the firm name of John D. Oakford & Co., in the business of commission merchants, in the city of Chicago. The partnership was dissolved on the last day of August, A. D. 1879.

It had made deposits with the International Bank, and drawn drafts upon it in the course of its business, and at the time of the dissolution the firm was indebted to the bank, on overdrafts, some \$11,000. After the dissolution of the partnership, John D. Oakford continued to do business under the old firm name of John D. Oakford & Co., and on the 1st day of September, A. D. 1879, he drew a check, in the name of John D. Oakford & Co., upon the International Bank, payable to Jos. Jones & Sons, for the sum of \$1,960.75, and delivered it to the payees, in payment for two hundred and fifty barrels of pork then bought by him of them. Payment of the check was refused by the International Bank, and this suit was brought by Joseph Jones, Benjamin Jones and Edward Jones, constituting the firm named as payees of the check, against the International Bank for the money which the check directed to be paid. It is clearly proved that on the day the check was drawn, and before presentment of the check, John D. Oakford deposited with the International Bank, to the credit of John D. Oakford & Co., more than enough money to pay this check, and enough to pay all checks drawn by him on the bank on that day, and this is not contested. But the International Bank claimed the right to apply the deposit made by him on that day, in payment of the overdrafts of the old firm of John D. Oakford & Co. (composed of Oakford & Thomas), and having done which, there were no funds left to meet this draft.

Upon the trial the plaintiffs gave evidence to the jury tending to prove that the cashier and president of the International Bank were notified of the dissolution of the firm of Oakford & Thomas, and that John D. Oakford would thereafter do business as a new firm, under the old firm name; that on the 1st day of September, A. D. 1879, they were expressly notified, before this check was drawn, that John D. Oakford, as the new firm, would draw checks upon the International Bank on that day, and that to meet those checks he would deposit the checks which he should receive in payment on sales made by him on that day; that after this check was drawn, and before it was presented for payment, they were expressly notified by Oakford that it had been drawn, and that he had made a deposit with the bank to meet its payment, to all of which they assented. On behalf of the International Bank, evidence was given tending to contradict this evidence, and to show that the officers of the bank had no knowledge that the firm of Oakford & Thomas had been dissolved, and that the deposits on the 1st day of September, A.

D. 1879, were made by John D. Oakford, alone, as John D. Oakford & Co., and also evidence tending to show that the officers of the bank had reason to believe that the transactions between Oakford and the bank on the 1st day of September, A. D. 1879, were but a continuation of the business of the old firm of Oakford & Thomas.

The general rule is, that a bank has a right to set off, as against a deposit, only when the individual, who is both depositor and debtor, stands in both these characters alike, in precisely the same relation, and on precisely the same footing toward the bank, and hence an individual deposit cannot be set off against a partnership debt. *Coates v. Preston*, 105 Ill. 470. See also *Morse Bank*, (2d ed.) 48.

In our opinion the objections urged by the defendant to the phraseology of the court, in the instruction given at the instance of the plaintiffs, and in the modification of the defendant's instructions, present an irrelevant question. If the jury believed the witnesses testifying on behalf of the plaintiffs, it was wholly immaterial in what book or in what manner the entries of deposits were made, because in that event they must have found that the bank knew that the transactions were, in fact, with John D. Oakford alone, and that the deposits were by him alone — and it could not relieve itself of the effect of this knowledge by a subsequent entry, reciting something different in a pass-book. If on the other hand, the jury believed the witnesses on behalf of the bank, and that it had no notice of the change of the partnership, and that John D. Oakford made the deposits on the first of September on account of the new firm, the entries in the pass-book were unimportant — they could add nothing.

It is enough to say, in respect to the alleged error in modifying defendant's instruction alleging the duty of John D. Oakford since the dissolution of the firm, to pay the firm debts by adding that it was "as much" his duty to pay them "after as before the dissolution," that the entire instruction related to an irrelevant matter, and that it should have been refused on that ground. Notwithstanding he owed the duty to pay the firm debts, still inasmuch as the bank could not set off the firm debt against his deposit, he could lawfully appropriate his deposit to a *bona fide* creditor by drawing a check in his favor on the bank for the amount, and thereby vest him with full power and authority to sue for and collect the same.

We cannot think that any inaccuracy in the language of the court in the instructions materially prejudiced the defendant.

The judgment is affirmed.

Judgment affirmed.

CONTINENTAL LIFE INSURANCE COMPANY V. ROGERS.

(119 ILL. 474.)

Insurance — warranties — representations.

Where the statement in a policy of insurance, that the answers, statements, etc., in the application "are warranted by the assured to be true in all respects," is followed by the statement, "that if this policy has been obtained by or through any fraud, misrepresentation or concealment, said policy shall be absolutely null and void," which fraud, etc., relates to the answers to the questions in the application, answers not material to the risk and honestly but mistakenly made in the belief they were true, will not effect a breach of the policy. (*See note, p. 816.*)

ACTION on a life insurance policy. The opinion states the case. The plaintiff had judgment below.

• *Swift & Campbell*, for appellant.

Smith & Burgett, for appellee.

MULKEY, J. The appellee, Caroline S. Rogers, recovered a judgment in the Superior Court of Cook county, against the Continental Life Insurance Company, for \$5,522.50, on a policy of insurance issued by the company to the plaintiff upon the life of her husband, Herbert S. Rogers. The policy is in the usual form, and bears date May 23, 1881. On the defendant's appeal, the judgment was affirmed by the Appellate Court for the first district, and the company thereupon appealed to this court.

The declaration is *in assumpsit*, and contains two counts. The first is a special count, setting out the policy and application *in hæc verba*, followed by the usual averments in such cases. The second is a consolidated common count for money had and received, for interest, and for money due on an account stated. The plea of *non assumpsit*, alone was filed to the whole declaration.

The plaintiff, being sworn as a witness in her own behalf, testified that she was the wife of Herbert S. Rogers at the time of making the policy; that he died on the 16th of December, 1883, at Minneapolis; that she found the policy, together with the company's receipts showing payments of the premium, among his papers, which were produced in court and put in evidence. The application,

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being in the possession of the defendant, was not offered in evidence by the plaintiff, or indeed by either party; nor had the defendant been served with any notice to produce it on the trial, other than that which may be implied by law from the bringing of the suit, and setting it out in the declaration. The policy offered in evidence contained the following provisions:

“Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by the company, and accepted by the assured, upon the following express conditions and agreements: * * *

“*Second.* That the answers, statements and declarations contained in or indorsed upon the application for this insurance — which application is hereby referred to and made part and parcel of this contract, as if fully recited herein, and upon the faith of which this agreement is made — are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, said policy shall be absolutely null and void.

“*Seventh.* That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented, in writing, to the officers of said company, at the home office, in Hartford, Connecticut, within two years after the death of the person whose life is hereby insured.”

In addition to this, the application, which is signed by the company as well as the assured, contains the following provision: “And it is hereby covenanted and agreed, that the statements and representations contained in this application and declaration shall be the basis of and form part of the contract or policy of insurance between said party or parties signing this application, and the said Continental Life Insurance Company, which statements and representations are hereby warranted to be true; and any policy which may be issued upon this application by the Continental Life Insurance Company, and accepted by the applicant, shall be so issued and accepted upon the express condition that if any of the statements or representations in this application are in any respect untrue, or if any violation of any covenant, condition or restriction of the said policy shall occur on the part of the party or parties signing this application, then the said policy shall be null and void, and all money which shall have been paid on account of said policy shall be forfeited to the said company.”

warranty by the assured in untruly answering certain questions in the application, the policy, among other statements, contained the following: "Fraud or intentional misrepresentation violates the policy, and the statements and declarations made in the written application for this policy and on the faith of which it was issued are warranties in all respects true, and do not suppress or omit any fact relative to the insured, affecting the interest of the company, or which whether material or not, would tend to influence the company in taking the risk." In the concluding part of the application occurs the following: "I, the undersigned applicant, * * * do hereby declare that the preceding answers to the annexed questions and written statements, in the preceding statement, declaration or warranty, together with the statements made to the examining physician, are warranties, correct and true, * * * and shall be the basis and form part of the contract or policy between the undersigned applicant and the said company, and if not in all respects true and correct, the policy shall be void." It is also further said in the policy, that the same is issued and accepted "in entire, unconditional honesty and good faith, and with the just intent of scrupulously fulfilling all the conditions and engagements of the contract with absolute certainty," etc. Under this state of facts, one of the questions made in the case was, whether the statements in the application were warranties or merely representations, and it was held they were the latter. The conclusion reached seems to have been placed mainly on two grounds, namely: First, because the good faith and honest intentions of the contracting parties are so studiously and conspicuously kept in the foreground of the transaction; second, it was thought that because of the frivolous character of many of the questions and answers, and the difficulty, if not impossibility, of proving many of them after the death of the assured, it could not have been intended to give them the force and effect of absolute warranties. As to the first ground of the decision, it was certainly a work of supererogation, so far as the assured was concerned, to make any reference whatever to his good intentions, honest purposes, etc., if as was claimed, his answers and statements were all warranties, binding him absolutely, without regard to whether they were made honestly or dishonestly.

Both of the elements forming the basis of the decision in that case are clearly present in this. Thus the statement in the policy

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that the answers, statements, etc., in the application, etc., are warranted by the assured to be true in all respects, is followed by the additional statement, "that if this policy has been obtained by or through any fraud, misrepresentation or concealment, said policy shall be absolutely null and void." It is clear the fraud, concealment and misrepresentation here contemplated can have no application to any thing other than the answers to the questions in the application. If true and full answers, there could be neither fraud, concealment nor misrepresentation, and if not full and true, upon the hypothesis that they were warranties, the assured would incur a forfeiture of the policy, whether there was any intentional misrepresentation or suppression of the truth or not. If the answers however are simply representations, as contradistinguished from warranties, in the technical sense of those terms, then such of the answers, not material to the risk, as were honestly made, in the belief they were true, would not be binding upon the assured, or present any obstacle to a recovery. It is clear therefore the only way in which to give that provision of the policy relating to fraud, concealment and misrepresentation, any effect at all, is by treating the answers in the policy as mere representations, and not warranties. If so treated, any defense founded upon an alleged misrepresentation or fraudulent concealment, it is clear, would have to be set up and proved by the company. And is this not more in consonance with the presumed intentions of the parties than the opposite view?

Turning our eyes to the policy, we find the assured is exhaustively examined with respect to his afflictions, through life, in the way of diseases. Each disease is specifically pointed out, and called to his attention in a separate interrogatory. Question follows question, until the number of diseases brought in review amount altogether to twenty-four, which is followed by just that number of categorical answers. Some of the diseases in this imposing list are of such a character that most persons afflicted with them would naturally shrink from giving publicity to the fact, and consequently no proof could be made after their death, one way or the other. Again he is asked the condition of his father's mother's health previous to her death, and he answers he does not know. Now, suppose this answer is to be regarded as a warranty, and that the plaintiff is bound to prove, as is claimed, the truth of it, as a condition precedent to a recovery, is it not clear no recovery could

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be had at all?—for from the very nature of the answer no proof could be made about it after his death. Moreover, this fact was just as well known to the parties at the time as it was after the death of the assured. The question then arises, ought a construction to be accepted as the true one, which will lead to such consequences, when another reasonable construction can be adopted which will not lead to such results, and will moreover, give effect to all the provisions of the policy, which the opposite construction clearly would not? We think not.

But leaving this all out of the question, whatever may be the holding of other courts on the subject, the rule seems to be well settled in this State that it is not necessary for the plaintiff, in an action on the policy, to either allege or prove such matters as appears in the application only. To be availed of as a defense, without regard to whether they are warranties or representations merely, their falsity or breach by the assured must be set up and proved by the defendant as matter of defense.

[Omitting the further consideration of this point and other points.] *Judgment affirmed.*

NOTE BY THE REPORTER.—In *Alabama Gold Life Ins. Co. v. Johnson*, Supreme Court of Alabama, May 4, 1887, an application for life insurance containing inconsistent expressions, one part tending to show an intention to make the answers warranties, and another treating them as representations, the court holds (1) that the answers are not absolute warranties, but in the nature of representations, or if warranties, only of an honest belief of their truth; (2) that any untrue statement or suppression of fact material to the risk will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the party or not; (3) that such statement of a material fact, though untrue, will not avoid the policy unless the party knew it was false, or was negligently ignorant of it; and (4) that the inquiries as to the symptoms of disease were not intended to be absolutely material, unless they had existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life. The court said:

“The question of most importance which is raised by the rulings of the court in this case is whether the answers made by the assured to the questions contained in the application for insurance are to be construed as absolute warranties, or in the nature of mere representations. The distinction between a warranty and a representation in insurance is frequently a question of difficulty, especially in the light of more recent decisions, which recognize the subject as one of growing importance in its relations, particularly to life insurance. As a general rule, it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in a nature of a condition precedent. It may be

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affirmative of some fact or only promissory. It must be strictly complied with or literally fulfilled, before the assured is entitled to recover on the policy. It need not be material to the risk, for whether material or not its falsity or untruth will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing warranted is material. It further differs from a representation in creating on the part of the assured an absolute liability, whether made in good faith or not. A representation is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient if representations be substantially true. They need not be strictly or literally so. A misrepresentation renders the policy void on the ground of fraud, while a non-compliance with a warranty operates as an express breach of the contract. The mere fact that a statement is referred to or even inserted in the policy itself, so as to appear on its face, is not alone now considered as conclusive of its nature as a warranty, although it was formerly considered otherwise. Whether such statement shall be construed as a warranty or a representation depends rather upon the form of expression used, the apparent purpose of the insertion, and its connection or relation to other parts of the application and policy, construed together as a whole, where legally these papers constitute one entire contract, as they most frequently do. *Bliss Ins., §§ 48 et seq.; Price v. Phoenix Mut. Ins. Co., 17 Minn. 497; s. c., 10 Am. Rep. 166, 172.*

"In construing contracts of insurance, there are some settled rules of construction bearing on this subject, which we may briefly formulate as follows: (1) The courts, being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured and strictly against the insurer. (2) It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation, and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against the construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction. (3) Even though a warranty in name or form be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the assured so often merely categorical, will be construed not to be a warranty of immaterial facts stated in such answers, but rather a warranty of the assured's honest belief in their truth; or in other words, that they were stated in good faith. The strong inclination of the courts is thus to make these statements or answers binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary. In support of these

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deductions we need not do more than refer to the following authorities: *Moulou v. American Life Ins. Co.*, 111 U. S. 835; *National Bank v. Insurance Co.*, 95 U. S. 673; *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497; s. c., 10 Am. Rep. 166; *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; s. c., 24 Am. Rep. 344; *Fitch v. American, etc., Ins. Co.*, 59 N. Y. 557; s. c., 17 Am. Rep. 372; Bliss Ins., § 34; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 331; *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec., note, 463-466; *Piedmont, etc., Ins. Co. v. Young*, 58 Ala. 476; Pars. Cont. *465 et seq.; *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Am. Dec. 309, 320; *Wilkinson v. Connecticut Mut. Life Ins. Co.*, 30 Iowa, 119; s. c., 6 Am. Rep. 657; 1 Phil. Ins., § 628; Ang. Ins., §§ 147, 147a.

"Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy-holders, who acting with all proper prudence, as remarked by Lord St. LEONARDS in the case of *Anderson v. Fitzgerald*, 4 H. L. Cas. 487; 24 Eng. Law & Eq. 1, had been 'led to suppose that they had made a provision for their families by an insurance on their lives, when in point of fact the policy was not worth the paper on which it is written.' The rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical conditions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate a departure from the rigidity of our earlier jurisprudence on this subject of warranties. And such, as we have said, is the tendency of the more modern authorities.

"There are it is true in this case, some expressions in both the policy and the application (which, taken together, constitute the contract of insurance) that indicate an intention to make all statements by the assured absolute warranties. The application, consisting of a 'proposal' and a 'declaration,' is declared to 'form the basis of the contract' of insurance, and the policy is asserted to have been issued 'on the faith' of the application. It is further provided that if the declaration or any part of it, made by the assured shall be found 'in any respect untrue,' or 'any untrue or fraudulent answers,' are made to the questions propounded, or facts suppressed, the policy shall be vitiated, and all payments of premiums made thereon shall be forfeited. So if there were nothing in the contract to rebut the implication, it might be held that the parties had made each answer of the assured material to the risk by the mere fact of propounding the questions to which such answers were made, and that this precluded all inquiry into the question of materiality. *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497; s. c., 10 Am. Rep. 166.

"On the contrary, the policy purports to be issued 'in consideration of the representations' made in the application, and of the annual premiums. The answers are nowhere expressly declared to be warranties; nor is the application, in so many words, made part of the contract so as to clearly import the answers into the terms and conditions of the policy. Among numerous other questions the assured was asked whether he had been affected since childhood with any one of an enumerated list of complaints or diseases, including 'fits

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or convulsions,' and whether he had 'ever been seriously ill,' or had been affected with 'any serious disease.' To each of these questions he answered 'No.' The concluding question is as follows: '(82) Is the party aware that any untrue or fraudulent answers to the above queries, or any suppression of the facts in regard to the party's health, will vitiate the policy, and forfeit all payments made thereon?' To this was given the answer 'Yes.' It is significant, as observed in a recent case before the New York Court of Appeals, that the assured 'is not asked whether he is aware that any unintentional mistake in answering any of the host of questions thrust at him, whether material to the risk or not, will be a breach of warranty, and vitiate his policy.' *Nich v. American, etc., Ins. Co.*, 59 N. Y. 557; s. c., 17 Am. Rep. 372. Then follows a declaration that 'the assured is now in good health, and does ordinarily enjoy good health,' and that in the proposal of insurance he 'had not withheld any material circumstance or information touching the past or present state of health or habits of life' of the assured, with which the company 'should be made acquainted.'

"One part of the contract thus tends to show an intention to constitute the answers warranties, while the other describes and treats them as representations. There is thus left ample room for construction. What is to be understood by 'untrue' answers, or 'any suppression of facts?' Can they have reference to any disease with which the assured was alleged to have been afflicted, of which he knew nothing, and could not possibly have informed himself by the exercise of proper diligence? Are they intended as absolute warranties of the fact that he had never, since childhood, or during life, been afflicted with diseases of which neither he nor the most skillful physician could have had any knowledge whatever? The case of *Moulton v. American Life Ins. Co.*, 111 U. S. 835, is a direct and strong authority for the position that the word 'untrue' in the above connection, in its broader sense, means knowingly or designedly untrue, or else recklessly so; that it is the opposite of sincere, honest, not fraudulent. As said in that case, it is reasonably clear that 'what the company required of the applicant as a condition precedent to any binding contract was that he would observe the utmost good faith toward it, and make full, direct and honest answers to all questions, without evasion of fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted, and that by doing so, and only by doing so, would he be deemed to have made fair and true answers.'

"The case of *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; s. c., 24 Am. Rep. 844, sustains the same view. There the policy as here was conditioned to be avoided by 'any untrue or fraudulent answer' to the questions in the application. The answers were not strictly true as to the birthplace, residence and occupation of the assured. It was held that none of these being material to the risk, they would be construed as representations, although expressly declared to be 'the basis of the contract' of insurance. The court said: 'It would seem to be gross injustice to allow this [meaning the avoidance of the policy and the forfeiture of all payments made under it] in a case where the insured has acted in the utmost good faith, and honestly disclosed every fact material to be known, because merely by inadvertence or oversight, an

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error of fact has been inserted in his application—an error that is clearly immaterial, and that could not by possibility have affected the contract. It is true the parties have a right,' the court adds, 'to make their own contract, and by its terms we must be governed; but before a court could hold a policy void, and all premiums paid thereon forfeited, because statements of this character in the application turned out to be untrue, they should be fully satisfied that such terms were fully and distinctly agreed to by the parties.'

"These views, in our judgment, announce the sounder and more just doctrine, and they meet with our approval, being supported by reason as well as by the more recent decisions in this country on the subject of life insurance. 3 Add. Cont. (Morgan's ed.), § 1223; *Pries v. Phoenix Ins. Co.*, 17 Minn. 497; s. c., 10 Am. Rep. 166, 174; *Fitch v. American, etc., Ins. Co.*, 59 N. Y. 557; s. c., 17 Am. Rep. 372.

"So the declaration embodied in the application would seem to indicate that it is the inadvertent suppression or statement only of material circumstances or information with which the company should in good faith be made acquainted that will vitiate the policy and cause a forfeiture. It cannot be supposed that one, who for the purpose of procuring insurance, alleges himself to be in good health, shall be understood as warranting himself to be in perfect and absolute health; for this is seldom, if ever, the fortune of any human being; and 'we are all born,' as said by Lord MANSFIELD in *Willie v. Poole*, Park Ins. 555, 'with the seeds of mortality in us.' These inquiries as to symptoms of diseases, as made by Mr. Parsons, therefore must mean whether they 'have ever appeared in such a way, or under such circumstances, as to indicate a disease which would have a tendency to shorten life;' and he adds: 'It is with this meaning the question is left to the jury.' 2 Pars. Cont. *468, *471; 3 Add. Cont. (Morgan's ed.), § 1238. It has accordingly been held in an English case, cited and approved by Mr. Parsons and Mr. Addison, that even a warranty that the party whose life is insured 'has not been afflicted with, nor is subject to vertigo, fits, etc., would not be falsified by having had one fit. To forfeit the policy on this ground he must have been habitually or constitutionally afflicted with fits. 'Even then,' adds Mr. Parsons, 'we apprehend the materiality of the fact would be taken into consideration; that is, for example, the policy would not be defeated by proof that the life insured long years before, and when a teething child had a fit.' 2 Pars. Cont. *471, *473; *Insurance Co. v. Wilkinson*, 13 Wall. 222.

"There is nothing decided in *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210, or in *Alabama Gold Life Ins. Co. v. Thomas*, 74 Ala. 578, which conflicts with the foregoing views. The cases of *Jeffries v. Life Ins. Co.*, 22 Wall. 47, and *Atina Life Ins. Co. v. France Ins. Co.*, 91 U. S. 510, are distinguished, if not modified in the latter case of *Moulton v. American Life Ins. Co.*, 111 U. S. 341.

"Our conclusion is that the following is a just and fair construction of the contract of insurance under consideration: (1) That the answers of the assured were not absolute warranties, but in the nature of representations; or if warranties, they are so modified by other parts of the contract as to be warranties only of an honest belief of their truth. (2) That any untrue statement or suppression of fact material to the risk assured will vitiate the policy, and thus

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bar a recovery, whether unintentional or within the knowledge of the assured or not. (3) If immaterial, such statement to avoid the policy must have been untrue within the knowledge of the assured; that is, he must either have known it, or have been negligently ignorant of it. (4) The terms of the contract rebut the implication that all symptoms of diseases inquired about were intended to be made absolutely material, unless they had once existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life, and thus affect the risk."

Of Phoenix Mut. Life Ins. Co. v. Raddin, Mass. Sup. Judicial Court, Jan. 31, 1887, the following is an abstract: An application for life insurance contained the following questions: "(28) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already insured in this company, state the number of policy." The answer was: "\$10,000 Equitable Life Assurance Society." *Held*, that the answer only purported to be an answer to the third of the four questions, and as that was answered truly and the company chose to issue a policy without requiring the others to be answered, it was no defense, in an action on the policy, that the insured had made other applications for insurance, which had been refused, even though the omission to state this was intentional. (1) Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in every thing material to the risk is all that is required of the applicant. *Moulton v. American Ins. Co.*, 111 U. S. 835; *Campbell v. New England Ins. Co.*, 96 Mass. 381; *Thomson v. Weems*, 9 App. Cas. 671. The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Macdonald v. Law Union Ins. Co.*, L. R., 9 Q. B. 328; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; 100 N. Y. 536. Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. *Cazenove v. British Equitable Assurance Co.*, 29 L. J. (C. P.) N. S. 160, affirming same case, 6 C. B. (N. S.) 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer and render the omission to answer more fully immaterial. *Connecticut Ins. Co. v. Luchs*, 108 U. S. 498; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; s. c., 8 Am. Rep. 52; *American*

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Ins. Co. v. Mahone, 56 Miss. 180; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300; 44 N. J. Law, 210; s. c., 39 Am. Rep. 584; *Lebanon Ins. Co. v. Kepler*, 106 Penn. St. 28. The distinction between an answer apparently complete but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. *Towne v. Fitchburg Ins. Co.*, 7 Allen, 51. But if to the same question he merely answers that the property is incumbered without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. *Nichols v. Fayette Ins. Co.*, 1 Allen, 63. In the contract before us the answers in the applications are nowhere called warranties or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract and on which it is based. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eighth question; to determine that it was immaterial for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterward make it material by proving that it was intentional. *London Assur. v. Mansel*, 11 Ch. Div. 363, distinguished. (2) If insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens. *Insurance Co. v. Wolff*, 95 U. S. 326; *Wing v. Harvey*, 5 De Gex, M. & G. 265; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154; s. c., 49 Am. Dec. 284; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Insurance Co. v. Stockbower*, 26 Penn. St. 199; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144.

Brewster v. Van Liew.

BREWSTER V. VAN LIEW.

(119 Ill. 554.)

Damages — measure — broker and customer.

Where a broker purchases stocks for a customer, subject to the customer's order, and wrongfully converts them to his own use, the measure of damages is the market value of the stocks at the time of conversion.

ACTION to recover money. The opinion states the case. The plaintiff had judgment below.

Frederic Ullman, for appellants.

A. J. Hopkins, N. J. Aldrich, F. H. Thatcher and Wallace W. Hickman, for appellee.

SHELDON, J. This was an action brought by appellee to recover from appellants money paid to them on a certain transaction in Denver and Rio Grande Railway Company stock.

On January 10, 1884, appellants, stockbrokers in Chicago, bought for appellee one hundred shares of said stock, furnishing a statement thereof, as follows:

“CHICAGO, January 10, 1884.

“DR. D. F. VAN LIEW:

“DEAR SIR— We have this day bought, for your account and risk, one hundred Denver, at 24. This account received by telegraph. Names of parties from whom above purchase was made will be given, if desired, as soon as advices are received by mail.

“Respectfully yours,

“EDWARD L. BREWSTER & Co.”

On the same day, appellee mailed to them \$1,000 in a letter, stating: “I herewith inclose your draft on Chicago for \$1,000 as per my promise to-day, on your purchase for me of one hundred shares of Denver and Rio Grande stock for 24, as per statement to me. The balance you will please carry for me, at six per cent, until I either pay it or order it sold, and oblige, yours,” etc.

About the 19th of January, 1884, appellee paid appellants \$500 more, in response to the following call:

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“CHICAGO, ILLINOIS, *January 19, 1884.*

“D. F. VAN LIEW, Aurora, Illinois:

“DEAR SIR— Your account requires additional deposit of \$500. Please favor us with the same.

“Respectfully yours,

“EDWARD L. BREWSTER & Co.”

On May 6, 1884, of his own volition, as appellee says, but as appellants say, on their request, appellee paid them \$400 more, making in all, \$1,900 paid by him. The market still declining, on June 19, 1884, appellants wrote to appellee, at Aurora, for \$500 additional. Receiving no reply, they telegraphed him on the 23d of June, 1884, asking why he did not reply, and then, later in the day, still getting no reply, they telegraphed appellee, “We have put a stop-order on your hundred Denver, at six and one-half. It will be sold at the market when it reaches there, unless you remit us before it is sold.” No response was received, and later, on the same day, the limit fixed by the stop-order was reached, and the stock was sold, on the Stock Exchange in New York, for \$637.50, the market price of the stock at the time of the sale being six and three-eighths. Appellee, shortly after, demanded that appellants deliver the stock to him, or refund to him the money paid. They refused, and this action was brought.

The parties differed in regard to the arrangement under which the stock was being carried. The claim of appellee was that appellants were to carry it for him for six per cent interest, until he should pay for the stock or order it to be sold. Appellants claimed that they acted as brokers for appellee in the purchase of the stock, without any special agreement to carry it for him; that they required a margin of ten per cent on the par value of the stock, and that appellee sent them such margin, amounting to \$1,000, and that the subsequent sums paid and demanded were for additional margins. The jury found a verdict for plaintiff for \$2,055, on which the Circuit Court rendered judgment, which was affirmed by the Appellate Court for the first district, and the defendants took this appeal.

Objection is taken to the giving by the Circuit Court of the following instruction for the plaintiff:

“If the jury believe, from the evidence, that the defendants made a contract or agreement with the plaintiff, by which they

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were to purchase for him one hundred shares of Denver and Rio Grande railroad common stock, for the sum of \$2,400, on the condition that he should pay, on the day following said purchase, to them the sum of \$1,000, and that they would carry the balance of said \$2,400 for plaintiff, on his paying them six per cent annual interest on such unpaid balance, and would hold said stock for his (plaintiff's) convenience, and that, in pursuance of said agreement, defendants did, in fact, purchase one hundred shares of said stock for said sum of \$2,400, and the plaintiff did, in fact, on the day following said purchase, pay the defendants the sum of \$1,000, and did, subsequently thereto, pay, by two different payments, the sum of \$900 more, making, in all, \$1,900 on said \$2,400, and that at the time of the last payment said defendant agreed with plaintiff to hold said stock for him, on the condition above stated, on his paying six per cent interest on all unpaid balance, annually, to suit plaintiff's convenience, even if said stock went to zero, and that without any notice to or authority, knowledge or consent of plaintiff, defendants sold said plaintiff's stock, and on his tendering to them the balance of said \$2,400, together with interest on such balances, if the proof shows such tender was made, at the rate of six per cent per annum, declined and refused to deliver to him said stock; and if you further believe, from the evidence, that plaintiff did tender such balance, with interest, on said stock, as aforesaid, and defendants declined to receive such tender, and declined to deliver to plaintiff said stock, and that thereupon the plaintiff demanded from defendants the money he had advanced them, and that defendants failed and refused to pay it, then, on that state of facts, plaintiff is entitled to recover all moneys advanced by him on said purchase of defendants, together with legal interest thereon, and you should so find by your verdict."

The giving of this instruction is supposed to be justified by the case of *Larrabee v. Badger*, 45 Ill. 441. The state of facts in that case and in the present is quite unlike. The plaintiff had there, on March 17, 1866, intrusted \$2,000 to the defendant, to purchase for the plaintiff two hundred shares of the stock of the Chicago and Alton Railroad Company. On March 19, 1866, the defendant notified the plaintiff that he had bought for him, for his account and risk, in New York, two hundred shares at eighty-nine and one-eighth. On the 4th of April, following, the plaintiff made a demand on the defendant for this stock, and on the refusal of the

defendant to deliver it to him, the plaintiff then demanded a return of his money. This the defendant refused, saying he had failed, and made an assignment, and was unable to comply with the demand, and the action was to recover back the \$2,000, and interest. The court there say: "Here the plaintiff had advanced \$2,000 to the defendant, with which the defendant was to buy two hundred shares of stock in the Chicago and Alton railroad for the plaintiff. The proof is, the defendant bought the stock in his own name, and had the same placed to his credit in New York, and that the name of the plaintiff did not appear in the transaction, and that the defendant sold this stock and appropriated the proceeds to his own use, and all without the knowledge or consent of the plaintiff." Again: "The facts do not show a contract for the purchase and delivery of stock, but an undertaking on the part of the defendant that he will buy two hundred shares of stock for the plaintiff, with the plaintiff's money. This is the whole extent of the contract, and on failure to buy for plaintiff, and by appropriating the money to his own use, justice would seem to demand, on his failure to buy the stock as instructed, the defendant should refund the money with interest." And further: "The position this defendant occupies in relation to the plaintiff, most clearly is, not that of a vendor of stock to plaintiff, but as an agent who has received of the plaintiff \$2,000 to invest for him in a particular way. By executing the trust the defendant would have discharged himself from liability; but it was no execution of it to buy and sell the stock in his own name and for his own use without authority, and he must now account for the \$2,000."

Thus it will be seen that the whole ground upon which that decision proceeded was a misappropriation of the money; that the money had been intrusted to the defendant for one purpose, of benefit to the plaintiff, and the defendant appropriated it for another purpose, for his own sole benefit; and it was held that an action would lie for the money, as for money had and received for the use of the plaintiff. In the present case there was no such misappropriation of money intrusted to the defendants, but the money was applied to the very purpose appellee designed to have it applied, to-wit, the payment of the purchase-price of stock which appellants had purchased for appellee. In the case cited *Larrabee* gave Badger the full purchase-price of certain shares of stock, Badger to buy them for Larrabee, in Larrabee's name, which he

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did not do, but bought them in his own name and subsequently converted them to his own use, whereas in the present case but a small portion of the purchase-money for the stock was furnished by appellee, the appellants having advanced the residue, and holding the stock, as the situation implied, as security or in pledge for their advances, commissions and interest.

The relation which exists between a broker and his customer in the case of the holding and carrying of stocks as here is declared in the leading case of *Markham v. Jaudon*, 41 N. Y. 235, defining the relative rights and duties of the broker and customer. It is there laid down that in advancing the money by the broker to complete the purchase of stock, the relation of debtor and creditor is created, and that thereupon the broker becomes a pledgee of the stock for the money advanced in its purchase — that the contract between the parties is in spirit and effect, if not technically and in form, a contract of pledge. And it was there held that for selling the pledge without authority, the measure of damages would be the difference between the amount for which the stock was sold and its highest market value down to the time of trial. This rule of damages was modified in the subsequent case of *Baker v. Drake*, 53 N. Y. 311; s. c., 13 Am. Rep. 507. It was there said: "Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? * * * If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale, and require the defendants to replace the stock. If they failed or refused to do this his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale, would afford a complete indemnity. * * * If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done." The same rule was held in *Gruman v. Smith*, 81 N. Y. 26. In *Coll v. Owens*, 90 N. Y. 368, the defendants purchased and agreed to carry certain shares of stock for the plaintiff until instructed by him to sell, or for a period of six months. De-

fendants sold the stock without authority and notified the plaintiff. In an action by the plaintiff the testimony showed that for thirty days after the sale the stock could have been purchased in the market for the price at which it was sold, or a less sum, and the court below held that only nominal damages could be recovered and directed a verdict accordingly. The judgment was affirmed. In *Sturges v. Keith*, 57 Ill. 452; s. c., 11 Am. Rep. 28, it was held that in an action for the conversion of personal property, the proper measure of damages is the market value of the property at the time of the conversion, and the court recognized no distinction where the property converted was stocks. In *Smith v. Dunlap*, 12 Ill. 184, it was held that the measure of damages in the case of a breach of contract for the sale of a chattel, is the cash value of the article at the time it should have been delivered, and it was said: "We have no hesitation in holding the rule applicable to contracts for the sale or delivery of personal property without regard to the circumstance whether the price has been paid or not. If unpaid, the purchaser recovers the difference between the price he agreed to pay and what the commodity was worth when it should have been delivered; if paid, he is entitled to recover the market value of the article when the delivery ought to have been made, and interest in the way of compensation for the delay." He may recover the market value of the article, and not for the purchase-price paid for the article, contrary to what is asserted in the present case to be the rule, that where one party to a contract refuses to complete it, the other party, being without fault, may sue for and recover back any money paid upon the contract. True the case at bar was not an action for the conversion of the stock, but in form was in assumpsit; but, as said in *Baker v. Draks, supra* (page 220), "the rule of damages should not depend upon the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him and no more, whether the action be in contract or tort; except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy. Chancellor KENT, in delivering the opinion of the Court of Errors (*Cortelyou v. Lansing*), though the action was in assumpsit, seeks the rule of damages in the principle applicable to an action for conversion." Appellee's real grievance is the not

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carrying the stock until he should pay for it or order it to be sold; that instead of so carrying it appellants sold it without his authority; that there has been a disposal of the stock without authority, a conversion of it. Suppose the stock had been carried, as appellee claims it should have been, he would then have had his stock when he had paid for it, and nothing more. In not having the stock the loss which he suffers is the value of the stock and nothing more. All that he justly can be entitled to have is the stock, and he is not, in justice, entitled to be placed in a better position than if he had the stock. The injury sustained is the being deprived of the stock, and the compensation which the law gives for the deprivation of property is the value of the property, and never the price which the owner had paid for the property, which latter was the rule of recovery laid down in this case.

Remark is made upon the title to the stock not having been taken in the name of appellee. He could not have expected to have the title until he had paid for the stock. From the nature of the relation between the parties, appellants were holding the stock as security for their advances, and to give them the benefit of an enforceable lien it was necessary that the title should be within their control, in order to enable them to realize on the stock, should there be need to do so. See *Horton v. Morgan*, 19 N. Y. 170.

We hold the instruction to be erroneous in laying down a wrong rule of the measure of damages.

The judgments of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court.

Judgment reversed.

TRUSTEES OF SCHOOLS V. SHEIK.

(119 Ill. 579.)

Bond — surety — conditional delivery.

Where sureties signed a school treasurer's bond on condition that it should not be delivered until signed by him, but it was delivered without his signature, although his name appeared in the condition and obligation, the obligee may recover on it in absence of proof of notice or knowledge of the condition of delivery, or of facts tending to put a prudent man on inquiry.*

ACTION on a bond. The opinion states the case. The plaintiff prevailed at trial, but this was reversed by the Appellate Court.

Frake & Ellis, for appellants.

Hill & Dibell, for appellees.

CRAIG, J. This was an action of debt, brought by the board of school trustees, against appellees, upon the bond of Philip Reitz, a defaulting school treasurer. In the Circuit Court, the plaintiffs recovered a judgment, but on appeal, the Appellate Court reversed the judgment, and decided that no action could be maintained on the bond against the sureties, and under this ruling no remanding order was entered. The bond was never executed by Philip Reitz; the principal, although his name was inserted in the condition and obligatory part of the instrument. It was properly executed by appellees, as sureties, and was accepted and approved by the board of school trustees.

Much reliance seems to be placed, in the argument, upon the finding of facts as incorporated in the judgment of the Appellate Court, it being claimed that the court found that appellees signed the bond upon the condition that it should not be delivered until it had been executed by the principal. We do not so understand the finding. The Circuit Court had found the facts, and recited in the record what that finding was, and this seems to have been adopted and sanctioned by the Appellate Court. Upon an exami-

* See *Mathis v. Morgan* (72 Ga. 517), 53 Am. Rep. 847; *White v. Duggan* (140 Mass. 18), 54 Am. Rep. 437; *Carroll Co. v. Ruggles* (69 Iowa, 269), 58 Am. Rep. 223. Also, see *contra*: *Smith v. Kirkland*, 81 Ala. 345.

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nation of the finding of the Circuit Court it will be seen that the court found, from the evidence, that Reitz promised the sureties that he would sign the bond before it was delivered. This however does not constitute the execution of a bond upon condition that it should not be delivered unless executed by the principal. Indeed, the sureties seemed to rely upon the promise of Reitz, and not upon a conditional delivery, as is apparent from the finding of facts by the Circuit Court, and from the decided weight of evidence.

It is also said that the liability of appellee should be construed strictly. The general rule is, that the undertaking of a surety is to be construed strictly. He is only bound in the manner and to the extent set forth in the obligation executed by him. *Cooper v. People*, 85 Ill. 417. But adhering to this rule to its ultimate limit, are the sureties liable on the obligation which they executed? The statute required this bond to be executed and delivered to the trustees, for the purpose of keeping secure the public funds, and for the purpose of guarding against a public loss. In view of this fact, while we regard it proper to adhere to the rule of law indicated above, still a surety who has incurred an obligation of this character should not be allowed to escape liability upon a mere technical defect in the obligation he may have executed, which does not go to the substance of his undertaking. Keeping this principle in view, we will examine the principal objections urged against the validity of the bond upon which the action is predicated.

It is claimed that where the name of an intended co-obligor appears upon the face of a bond, who has not executed it, the instrument is imperfect, and not binding. The decisions of the courts of different States are not harmonious in regard to the binding effect of a bond upon the rights of sureties, where the bond has not been executed by the principal. In *Bean v. Parker*, 17 Mass. 603, where an action was brought against the sureties on a bail bond which had not been executed by the principal, the court held that no action could be maintained. It is there said: "We think it essential to a bail bond that the party arrested should be a principal. It is recited that he is, and the instrument is incomplete and void without his signature." In a late case, *Russell v. Annable*, 109 Mass. 72; s. c., 12 Am. Rep. 665, where the principals in a bond constituted a firm, and the firm name was signed by one of the partners, the court held that the surety was not bound unless it appeared that the partner who signed the firm name had authority

from his partner to do so. In *Wood v. Washburn*, 2 Pick. 24, an administrator's bond not executed by the administrator was held not to be binding on the surety. In *Ferry v. Burchard*, 21 Conn. 602, a similar question arose, and the court held that a contract of a surety was of such a nature that there could be no obligation on his part unless the principal was also bound. In *Brown v. Jetmore*, 70 Mo. 228 (a late case and one too, quite similar to the one before us), the sureties on a constable's bond were held not liable for a default of the constable upon the sole ground that the bond had not been executed by the principal. There are other cases holding a like view, and there are others which hold that the sureties may be held liable although the principal did not execute the instrument. *State v. Bowman*, 10 Ohio, 445, was an action on a treasurer's bond. The principal's name was in the body of the bond, but he did not sign the instrument. The sureties defended on the ground that the principal had not signed it, but the court held that they were bound. *Loen v. Stocker*, 68 Penn. St. 226, was an action against sureties on a bond of indemnity. The principal's name had been signed without authority. In the decision of the case it was said: "Had the bond not been executed at all by the principal, though his name was mentioned as one of the obligors in the body of the instrument, it is clear that the surety could not avail himself of this fact as a defense." *Herrick v. Johnson*, 11 Metc. 34; *Keyser v. Keen*, 17 Penn. St. 330; *Haskins v. Lambert*, 16 Me. 142; *Grim v. School Commissioners*, 51 Penn. St. 219; *Williams v. Marshall*, 42 Barb. 524, and *Miller v. Ferris*, 10 Upp. Can. 423, announces a similar rule.

Johnson v. Township of Kimball, 39 Mich. 187, is a case in its facts quite similar to the one under consideration. There, as here, the suit was against the sureties on the official bond of a defaulting treasurer. The bond was drawn setting out the names of the principal and sureties, but it was never executed by the principal. In the decision of the case the court said: "Our statute plainly contemplates that the treasurer shall himself be a party to his own official bond. And while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of the opinion that where he purports to be obligor, and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature, before they can be held responsible." See

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also *Hall v. Parker*, 39 Mich. 287, where the same doctrine is announced.

We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts that a bond signed by the sureties without the signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bonds? If they are compelled to pay the trustees any sum of money on account of default of the treasurer, they can recover the amount back from him whether he signed the bond or not. So far then as they are concerned, they are in as good a position as if Reitz, the treasurer, had properly executed the bond. If Reitz is insolvent, a judgment in favor of the trustees against him, could be of no benefit to the sureties. If, on the other hand, he is solvent, the sureties can collect from him whatever sum they may be required to pay in consequence of executing the bond. If the bond had been signed by the sureties upon condition that it should not be delivered to the trustees until executed by the treasurer, and if the trustees had received notice of such condition, or notice of such facts pointing to such a condition as might put a prudent person on inquiry before the bond was approved, then they could not be regarded as innocent holders of the instrument, and entitled to maintain an action upon it. But the sureties, as appears, did not sign the bond on such a condition, but executed the instrument, and relied merely upon the promise of the treasurer that he would, before delivery of the bond, sign it. This was no more than a secret promise made by Reitz, the treasurer, to those who signed as sureties, which could not be binding upon the trustees. They had no notice of the arrangement existing between the treasurer and the sureties, and they ought not to be affected by it.

In *Smith v. Peoria County*, 59 Ill. 414, where an action was brought upon an official bond against one of the sureties, he set up as a defense that he signed the bond on condition that it should

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also be executed by one Cox, as co-surety, before it should be delivered; that Cox failed to execute the bond; that in violation of the agreement, the bond was delivered, without his knowledge or consent. On demurrer to pleas in which this defense was set up, the matters alleged were held not to constitute a valid defense to the action on the bond, but other pleas in which the same facts were set up, and also that the plaintiff had notice, were held to constitute a valid defense to the action. Under the ruling in the case cited, if the bond in this case was signed by appellees upon condition that it was not to be delivered until executed by the principal, and the trustees, at the time they accepted and approved the bond, had notice, no action could be maintained on the bond; but as said before, no such defense was made out.

The judgment of the Appellate Court will be reversed, and the cause remanded to that court for further proceedings in conformity to this opinion.

SCHOLFIELD, J., dissenting.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

VAN EVERY V. FITZGERALD.

(21 Feb. 28.)

Evidence — books of account — time-books.

Ordinary time-books, merely used to keep the time of the workmen for a party, are not admissible in evidence under a statute authorizing only the admission of "books of account containing charges by one party against the other."*

ACTION for work and labor in removing dirt. The opinion states the point. The plaintiff had judgment below.

Lamb, Rickets & Wilson, for plaintiff in error.

Marquett, Dewees & Hall, for defendant in error.

COBB, J. [Omitting statement of pleadings.] There are thirty-three errors assigned; but as we were all of the opinion at the argument that there must be a new trial for error in the admission of the time-books of the defendant in evidence on the trial, none of the other assignments will be considered. Our examination will accordingly be confined to number twenty-nine of plaintiff's assignments, which is as follows:

"29. The court erred in admitting, over the plaintiff's objection, the book account and the account book marked on the back with

* See *Mayor, etc., v. Sec. Ave. R. Co.* (102 N. Y. 572), 55 Am. Rep. 689.

lead pencil, 'Holdredge,' and given as a part of the answer one thousand one hundred and twenty-six of the witness John Muldoon."

The book referred to as having been offered and received in evidence in the above assignment of error is the time-book of the defendant, used to keep the time of the workmen employed by him in completing the job of railroad work, which as alleged in the answer, the plaintiff had abandoned and left undone of the job sub-contracted by the plaintiff from and under the defendant, and which as defendant claimed, he had the right to complete, and did complete, at the cost of the plaintiff, and it was for the purpose of establishing before the court and jury the amount of the cost of said work and the completing of said job, that the said time-book was offered in evidence. The book was proved by the witness, John Muldoon, whose examination is given at length in the abstract. It is not my purpose to examine this evidence as to whether the same is sufficiently full as a foundation for the introduction of the said book in evidence, as the difficulty lies at the very threshold, the admissibility of a book of entries of the character of those in question, and for the purpose of proving an independent fact, value, or quantity, such as that sought to be established here.

Section 346 of the Civil Code provides that "books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to credibility: 1st. The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party, in the same book 2d. It must be shown by the party's oath, or otherwise, that they are his books of original entries. 3d. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof. 4th. The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made."

I know of no authority outside of the above section of statute for the admission of books of account or time-books in evidence in a law suit, and certainly the above provisions of law do not cover books such as the one introduced in evidence in the case at bar.

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The book in this case does not, nor does it purport to contain entries of charges against the plaintiff, or of dealings with him. It only purports to show by certain lines and cross-lines, with dates between the cross-line at the top, and names on the lines at the left hand side, with check-marks at the intersections of the lines, the number of days worked by each man or hand engaged upon the work. The primary objects of these entries was obviously to enable the defendant to settle with his hired men, and perhaps for the secondary purpose of keeping an account of the cost of each job of railroad work. If it appeared on the face of this book that the object of keeping the account was to charge the days' works of these men respectively to the plaintiff, I think under the authorities that it would be admissible in evidence.

In the case of *Mathes v. Robinson*, 8 Metc. 269; s. c., 41 Am. Dec. 505, an account for labor performed by the plaintiff and his apprentice for the defendant, was proven by a book kept in the same general manner as the book in the case at bar, except that there the page of the book ruled off the same as in this case is headed "Mr. David Robinson, Dr. to;" then follows the names of plaintiff and of his apprentice on separate lines, etc. Here the name of Van Every does not appear anywhere on the book. There the account was evidently kept for the purpose of charging the work of the plaintiff in that case, and of his apprentice, to the defendant therein; here the account was evidently kept for the purpose of crediting each individual laborer with his time of labor, and on the face of the book, its proprietor, the employer of the laborers, was charged in favor of each laborer with the number of days' work, as there shown.

While I am quite clear that a book of account, to be admissible in evidence as such, must consist of charges by one party against the other, as we held in the case of *Martin v. Scott*, 12 Neb. 42, yet I am equally certain that a witness who has kept a time-book such as the one now under consideration, and who knows that it was correctly kept, can by the use of the said book as a memorandum testify to its contents as independent facts, although at the same time, even with the aid of such memoranda, he does not remember the occurrence of the facts. See *Lipscomb v. Lyon*, 19 Neb. 511.

For error in the admission of the said book in evidence, the judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with law.

The other judges concur.

Reversed and remanded.

PARKER V. KUHN.

(21 Neb. 418.)

Statute of limitations—fraud.

A statute prescribes the time within which may be commenced "an action for relief on the ground of fraud," and provides that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." *Held*, that the statute will begin to run from the time when the party became aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which pursued would lead to such discovery.

ACTION *quia timet*. The opinion states the case.

H. D. Estabrook, for appellants.

George W. Doane, for appellee.

COBB, J. This is an action in the nature of *quia timet*, brought by the appellee against the appellants in the District Court of Douglass county for the purpose of quieting his title in and to the real property described in the petition.

[Omitting statement of pleadings.]

The cause was tried to the court with a finding and decree for the plaintiff, and is brought to this court by the defendants by appeal.

The testimony is very voluminous, the abstract of which fills forty-one closely printed pages. Therefore even were it necessary, it would be impossible to set out in this opinion more than the briefest summary of it. But I do not think it necessary. By the note or stipulation above copied the defendants admit the paper or record title to all the lands involved in the suit to be in the plaintiff and to be regular on its face. This title as to nearly all of the lands had its inception in mortgages or conveyances found and held by the District Court to be mortgages, executed and dated in 1857, and was perfected by legal proceedings and a master's deed in 1860; and as to the balance of the lands it had its inception in a mortgage executed in 1859, and was consummated by legal proceedings and master's deed in 1863. The plaintiff in and by his reply to the answer of the principal defendant pleads and invokes the protection of the statute of limitations.

The language of the statute of limitations, taken in its literal sense, limits the time in which actions may be commenced after the accruing of the cause of action, or the right to enforce which the action is brought only, but it applies equally to the same facts or rights when they are pleaded as a defense or counter-claim or in the nature of a cross-action. That part of the Code of Civil Procedure from section 5 to section 22, both inclusive, is usually referred to and known as "the statute of limitations." This statute prescribes the time within which actions may be brought for the redress of every class of wrongs and the enforcement of every species of rights provided for in the Civil Code, and it is worthy of notice that the longest time prescribed within which any action can be commenced "after the cause of action shall have accrued" is ten years.

The sections of the above statute especially applicable to the case in which it is here invoked are sections 6 and 12. Section 6 provides that "An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action shall have accrued," etc. Section 12 places within the class of cases which by the previous section are required to be brought within four years "after the cause of action shall have accrued," the following: "An action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

I do not deem it necessary or expedient to follow counsel to the discussion of the question as to whether the above statute applies to equity cases. The language of the clause last above quoted seems to me to be conclusive that it was intended to apply to cases where relief is sought in equity, even if it can be conceived that its application is not confined to such cases. The defendant Kuhn, being sued in a court of equity, seeks relief not only against the case alleged against him by the plaintiff, but also prays both specific and general relief against the plaintiff "on the ground of fraud." In this State all courts of general jurisdiction are courts of equity. The system of procedure under the code is patterned after that formerly prevailing in courts of equity rather than that prevailing in courts of law. The statute in its terms applies generally to suits in such courts "for relief on the ground of fraud;" it must therefore be held to be applicable to the case at bar.

There is an apparent conflict in the authorities as to when the statute in cases like the one which we are now considering, commences to run. This question has been twice presented to this court and to some extent considered.

The case of *Blake v. Chambers*, 4 Neb. 90, was an action for the fraudulent misapplication of trust funds by an executor and to subject certain real property into which such trust funds have been converted to the payment of the plaintiff's claims against the testator. Among other defenses the defendant invoked the statute of limitations. In delivering the opinion of the court then LAKE, C. J., said: "As to the statute of limitations, on which some reliance seems to have been placed, it is well settled in courts of equity in cases like the one under consideration, that the statute will not commence to run until the discovery of the fraud. And in this State such is the statutory rule. Gen. Stat. 525, § 12. In this case it is expressly alleged that this fraudulent misapplication of the assets of the estate was not discovered until after the 1st day of January, 1874, so that in any event the statute did not begin to run until after that time, which was but a few days prior to commencing the action."

The other case was that of *Welton v. Merrick County*, 16 Neb. 83. This action was brought to recover back money paid to the county for taxes alleged to have been unlawfully demanded and received by the county in the year 1876 on certain unpatented railroad lands. The plaintiff alleged that he had no knowledge of the illegality of such taxes prior to the 1st day of December, 1881. The defendants' demurrer invoking the statute of limitations was sustained, which was assigned for error in this court.

The present chief justice, in delivering the opinion of the court, said: "It is very clear that there is no error in the ruling of the court below. Even if a cause of action had existed in favor of the plaintiff upon the payment of the taxes in controversy, it was barred by the statute of limitations. If a party with ordinary care and attention could have detected even fraud, he will be charged with actual knowledge of it; that is, the mere fact that a party is not aware of the existence of certain matters where there is no concealment will not prevent the running of the statute of limitations. Angel Lim., § 187. But in this case there is no pretense of fraud."

The point of divergence in these cases is readily seen to be where, in the latter case, the statute is declared to have commenced to run

when the party with ordinary care and attention could have detected the fraud rather than when it was discovered. None of the English cases can be relied upon as authority upon this point as to the true construction of the meaning of our statute. Their statutes of limitations from that of 32 Henry VIII to 3 and 4 William IV, exclusive of the latter, are silent on the subject of fraud or other matters of equitable jurisdiction, and the clause of the twenty-sixth section of the latter statute applicable to the point now being examined, is in the following language: "XXVI. That in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rents of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered," etc. This statute is, I think, still in force. At all events it was under it that *Vane v. Vane*, L. R., 8 Ch. 383, and *Chatham v. Hoar*, L. R., 9 Eq. 571, cases cited in the note to 2 Story's Eq. Jur. (13th ed.), § 1521, as "the more exact rule" were decided. That the more exact rule under that statute is that the statute commences to run at "the time at which such fraud shall, or with reasonable diligence might have been first known or discovered," cannot be doubted; but does it follow that it is the rule under a statute like ours, which lacks the words to which that statute doubtless owes such construction?

Of the States of the Union, so far as my limited time enables me to examine, only Michigan, Wisconsin, Iowa, California, Minnesota, Kansas, and New York have or had at the time of Mr. Angell's compilation, provisions in their statutes of limitations like our own. I do not find that such provision has been construed by the Supreme Courts of either of the three first-mentioned States. The provision of the statute of California corresponding to that of our own which we are now considering, was considered and construed by the Supreme Court of that State in the case of *Boyd v. Blankman*, 29 Cal. 19. The case is long and much involved. I quote that part of the syllabus which is in point:

"An action for relief on the ground of fraud may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry."

In the State of Minnesota, the case of *Commissioners of Mower County v. Smith*, 22 Minn. 97, an action brought by the county commissioners against a defaulting county treasurer, and in which the bar of the statute was pleaded, came before the Supreme Court by appeal. In the opinion the court say: "If the defendant, occupying as he did a fiduciary relation to the county, converted the money, it was a fraud within the rule in *Cock v. Van Ellen*, 13 Minn. 522, and the time limited for the commencement of the action began to run upon the discovery by the plaintiff of the fraud or notice to it of such facts and circumstances, as if investigated, would lead to such discovery." But strange enough, we find in the syllabus of the case written by the chief justice who wrote the opinion, the following: "Where there has been a fraudulent conversion, the time limited for the commencement of the action is to be counted from the discovery of the fraud."

The corresponding section of the statute of Kansas was in a manner before the Supreme Court of that State in the case of *Marbourg v. McCormick*, 23 Kans. 38. The plaintiff in error, an agent of the McCormicks, in settling with them, had passed to them as genuine, and by false representations induced them to receive in payment of a balance due them on such settlement, a certain note of hand which proved to have been signed by him with the name of a fictitious person, and to be worthless. Upon suit by the McCormicks for such fraud, Marbourg pleaded the statute of limitations. Upon the trial the court gave the following instruction to the jury: "The time when the statute of limitations would commence to run would not be when mere suspicions were aroused, as that would not be in itself regarded as a discovery, but as a circumstance leading to further investigation. So that in this case, if you find from the evidence as adduced any fraud on the part of defendant, the discovery of such fraud would be when the plaintiff had knowledge thereof, and not when they had mere suspicions only." The giving of this instruction was assigned for error in the Supreme Court. In the opinion of the court, Judge BREWER, after quoting said instruction, said: "The testimony upon which such instruction was founded was that of plaintiff's agent, that when he made settlement with defendant and received the note his suspicions were aroused by noticing that it was all in the handwriting of the defendant, the maker not signing but making his mark; that thereupon he inquired of defendant concerning the

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maker and received in reply the statements and representations heretofore noticed; that these suspicions were afterward strengthened by the return of a letter uncalled for which he had directed to Patrick Flynn at Kennekuk. Now, in view of these facts, we think the instruction correct. 'Discovery of the fraud' is the language of the statute. That implies knowledge and is not satisfied by mere suspicion of wrong. The suspicion may be such as to call for further investigation, but is not itself a discovery. A party, even though his suspicions have been aroused, may well be lulled into confidence and take no action by such representations as were made. And it would be strange if a party who had disarmed suspicions by his representations could thereafter plead those suspicions as ground for immediate inquiry and action," etc.

Strange as it may seem the precise point now before us does not appear to have been directly considered by the courts of New York. The statute is cited however and to some extent considered by the Superior Court of New York city in the case of *Mayne v. Griswold*, 9 N. Y. Leg. Obs. 25. I quote from the syllabus: "A bill filed for relief on the ground of fraud, which shows on its face that the fraud was committed more than six years before the filing of the bill, should not merely state in anticipation of the defense of the statute of limitations that the fraud was discovered within six years, but show that it could not with reasonable diligence have been discovered sooner." To the same effect is the case of *Bertine v. Varian*, 1 Edw. Ch. 343.

From these cases it would seem that none of the courts have been content to leave to the statute the plain import of its words. This may arise from the use of the word "discovery." This word, when used in reference to past transactions or omissions cannot have the same literal meaning as when applied to the discovery of a new continent or of a principle in physics. Fraud in a past and consummated transaction cannot be the subject of direct ocular or auricular discovery or knowledge. The discovery then of which the statute speaks, is of evidence or of evidential facts leading to a belief in the fraud and by which its existence or perpetration may be established, and not of the fraud itself as an existing entity.

If I am correct in the above, the inference follows that it is impossible to lay down any general rule as to the amount of evidence or number or nature of evidential facts which must be discovered before the statute will commence to run; therefore the rule sup-

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plied by the clause of section 26, chapter 27, 3 and 4 William IV, above quoted, and which seems to be followed more or less closely by the cases above cited, is after all, "the more exact rule."

To return to the case at bar. The frauds or facts alleged to have been fraudulent on the part of the plaintiff and relied upon by the defendant Kuhn as a defense to the action and as the ground of relief to himself, all occurred more than ten years, in point of fact more than twenty years, before the commencement of the action. The defendant is then barred of his defense unless it be true that down to a point of time less than four years before the commencement of the action, the defendant was in ignorance thereof or of any fact or circumstance connected therewith sufficient to put a person of ordinary intelligence and prudence upon inquiry in respect thereto.

[Omitting questions of pleading and of fact.]

The other judges concur.

Decree affirmed.

PALMER V. ROWAN.

(21 Neb. 452.)

Action — privilege of party from suit while returning from trial.

One charged with a criminal offense in another county than that of his residence, and who on the trial is discharged, is privileged from civil suit in that county until the lapse of a reasonable time to enable him to return home.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

Thummell & Platt, for plaintiff in error.

O. A. Abbott, for defendants in error.

MAXWELL, C. J. The plaintiff sued defendants on a promissory note for the sum of \$530, executed and delivered by them to plaintiff in the city of Grand Island, county of Hall. The case was filed in the County Court on the 7th day of September, 1885, summons issued and delivered to the officer to serve, returnable on the

* See note, 38 Am. Rep. 717; *Smith v. Jones* (76 Me. 188), 49 Am. Rep. 598.

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first Monday of October, 1885, or on the first day of the next term of the County Court of said county.

The defendants were under indictment to appear and answer at the September (1885) term of the District Court of said county, to-wit: September 8th. They had been indicted a long time previous, and had given bail for their appearance at said term. They appeared, and after several days' trial were acquitted. On the afternoon of the day of acquittal the officer having said summons in his possession served the defendants with a copy of the writ for their appearance at the next term of the said County Court in said county to answer to the action on the note. On the answer day, to-wit, October 5, 1885, the defendants filed a plea to the jurisdiction of the court over the person of the defendants, for the reason they were served while in attendance on court, without being subpoenaed, they being residents of another county in this State.

To this plea the plaintiff filed a demurrer. The demurrer was overruled and the case was dismissed at the cost of plaintiff. Plaintiff took the case to the District Court, where the same ruling was made, the court dismissing and overruling the petition in error.

At common law, parties and witnesses attending in good faith any legal tribunal were privileged from arrest on civil process during their attendance and for a reasonable time in going and returning. *Thompson's case*, 122 Mass. 428. And this whether they attend on summons or voluntarily, and whether they have or have not obtained a writ of protection. *Walpole v. Alexander*, 3 Doug. 45; *Meekins v. Smith*, 1 H. Bl. 636; *Arding v. Flower*, 8 T. R. 534; *Spence v. Stuart*, 3 East. 89; *Ex parte Byne*, 1 Ves. & B. 316; *Persse v. Persse*, 5 H. L. Cas. 671; *McNeil's case*, 6 Mass. 245; *Wood v. Neale*, 5 Gray, 538; *May v. Shumway*, 16 Gray, 86; GRAY, J., in *Thompson's case*, *supra*.

In some of the early cases in this country it was held that the privilege of suitors and witnesses extended no further than exemption from arrest, and that service by summons was legal, and where an arrest was made, common bail must be filed or a general appearance entered. *Blight v. Fisher*, Pet. C. C. 41; *Hunter v. Cleveland*, 1 Brev. 167; *Taft v. Hoppin*, Anthon N. P. 255; *Booraem v. Wheeler*, 12 Vt. 311. The tendency of the courts however has been to enlarge the privilege and to afford full protection to suitors and

witnesses from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time in going and returning.

In *People v. Judge*, 40 Mich. 729, in a well considered opinion by Judge COOLEY, it is said, "There is no doubt whatever that the privilege exists in the case of all proceedings in their nature judicial, whether taking place in court or not. *Fletcher v. Baxter*, 2 Aik. 224; *Sanford v. Chase*, 3 Cow. 381; *Clark v. Grant*, 2 Wend. 257; and in *Reinmer v. Green*, 1 M. & S. 638, it was very justly recognized in the case of bail attending for the purpose of justification. In *Commonwealth v. Hawkes*, 13 Bush, 699; s. c., 26 Am. Rep. 242, where the privilege was allowed in the case of one brought within the jurisdiction on process of extradition, it is clearly shown that the reason of the privilege must determine its extent." To the same effect see *Cannon's case*, 47 Mich. 482; *Baldwin v. Judge*, 48 Mich. 525.

In *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 542, where a resident of Bay county, who was a party to two suits pending in the county or Huron, and went into the latter county to attend the trial thereof, he was examined as a witness in one of the cases, and the other case was continued. While so in attendance he was served with summons in the latter county in another case; he applied to the court on a showing of the facts to set aside the service, but the application was refused; he then applied to the Supreme Court for a *mandamus*. The court, per COOLEY, J., say: "We think the case is within the principle of *Watson v. Judge of Superior Court*, 40 Mich. 729, and that the writ should issue. Public policy, the due administration of justice, and protection to parties and witnesses alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also. The following cases may be referred to for the general reasons: *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Dixon v. Ely*, 4 Edw. Ch. 557; *Clark v. Grant*, 2 Wend. 257; *Seaver v. Robinson*, 3 Duer, 622; *Person v. Grier*, 66 N. Y. 121; s. c., 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568; *Hall's case*, 1 Tyler, 274; *In re Healey*, 53 Vt. 694; s. c., 38 Am. Rep. 713; *Miles v. McCullough*, 1 Binn. 77; *Halsey v. Stewart*, 4 N. J. L. 366; *Dungan v. Miller*, 37 N. J. L. 182; *Vincent v. Watson*, 1 Rich. Law, 194; *Sadler v. Ray*, 5 Rich. Law, 523; *Mar-*

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ten v. Ramsey, 7 Humph. 260; *Dickenson's case*, 3 Harr. (Del.) 517; *Henegar v. Spangler*, 29 Ga. 217; *May v. Shumway*, 16 Gray, 86; *Thompson's case*, 122 Mass. 428; *Ballenger v. Elliott*, 72 N. C. 596; *Parker v. Hotchkiss*, Wall. C. C. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Arding v. Flower*, 8 T. R. 534; *Newton v. Askew*, 8 Hare, 319; *Perse v. Perse*, 5 H. L. Cas. 671. See also *Matter of Cannon*, 47 Mich. 481."

In *Compton v. Wilder*, 40 Ohio St. 130, one U., a resident of Pennsylvania, was extradited from that State upon a requisition issued by the governor of Ohio upon application of one C., in a criminal prosecution; it was held that the service of summons and an order of arrest issued in a civil action brought by C. against U. and made upon U. directly after he had entered into a recognizance to appear before the Court of Common Pleas at its next term, and before he had an opportunity to return to his home, was rightly set aside.

In *Person v. Grier*, 66 N. Y. 124; s. c., 23 Am. Rep. 35, it is said: "It is the policy of the law to protect suitors and witnesses from arrest upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil action against them is absolute *eundo, morando et redeundo*. This rule is especially applicable in all its force to suitors and witnesses from foreign States attending upon the courts of this State. In some instances witnesses and suitors, residents of the State, have only been discharged from arrest upon filing common bail, but the service of process upon non-resident witnesses and suitors has been absolutely set aside, thus giving color to a distinction between the two classes in respect to their immunity. Whether any distinction should or does in fact exist is at least doubtful. This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses while attending court could be molested with process. Witnesses might be deterred and parties prevented from attending, and delays might ensue or injustice be done. In *Norris v. Beach*, 2 Johns. 294, the defendant, a resident of the State of Connecticut, attending in this State to prove a will, was held exempt from the service of a *capias* and discharged absolutely from the arrest. The like relief was granted in *Sanford v. Chase*, 3 Cow. 381, and the defendant, a resident of Massachusetts, arrested upon civil process while attending as a wit-

ness before arbitrators, was discharged absolutely without filing common bail, the court saying: "The privilege of a witness should be absolute." The court in *Hopkins v. Coburn*, 1 Wend. 292, expressly affirm the absolute immunity of foreign witnesses attending our courts from the service of civil process for the commencement of an action. The same rule was held in *Seaver v. Robinson*, 3 Duer, 622, and *Merrill v. George*, 23 How. 331, and the service of a summons upon persons attending from other States was in each case set aside. This case in *Van Liew v. Johnson* (decided in March, 1871, but not reported) substantially adjudged that a summons could not be served upon a defendant, a non-resident of the State, while attending a court in this State, as a party. Four of the judges taking part in that decision were of the opinion that neither a party nor a witness attending court in this State from a foreign State could be served with a summons for the commencement of an action."

In *Matthews v. Tufts*, 87 N. Y. 570, the case of *Van Liew v. Johnson*, above referred to, is cited with approval, and the court say: "This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice; it is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority."

In *Huddeson v. Prizer*, 9 Phila. 65, the court says the immunity "is alike the privilege of the person and the privilege of the court; it renders the administration of justice free and untrammelled and protects from improper interference all who are concerned in it." See also *Larned v. Griffin*, 12 Fed. Rep. 590, where many of the cases are reviewed. *Atchison v. Morris*, 11 Fed. Rep. 582; *Plimpton v. Winslow*, 9 Fed. Rep. 385; *Bridges v. Sheldon*, 7 Fed. Rep. 19; *Brooks v. Farwell*, 4 Fed. Rep. 166; *Parker v. Hotchkiss*, 1 Wall. Jr. 269.

The defendants in their answer, in addition to showing that they had given bail to appear at the time and place stated, allege that they were necessary witnesses on the trial and therefore could not be served with summons in a county in which they did not reside. We do not wish to place our decision upon the narrow ground that the immunity applies only to witnesses; it applies also to parties and is necessary to the due administration of justice. The defendants therefore would have been entitled to immunity from service of civil process upon them if they had not given bail for their

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appearance at the time and place stated. They were defendants to an action in which the State was the party prosecuting, and they were entitled to defend the same without fear of molestation from the commencement of civil actions against them. The rule applies with greater force however when they had given bail to appear. We hold therefore that they could not be served with summons until reasonable time had elapsed after their discharge to enable them to return to their homes.

There is no error in the record and the judgment will be affirmed.

The other judges concur.

Judgment affirmed.

UECKER V. KOEHN.

(21 Neb. 550.)

Infancy — contract — ratification.

Where an infant executes a purchase-money mortgage for land, and after majority conveys the land, he thereby ratifies the mortgage.

ACTION to declare a mortgage a lien, etc. The head-note shows the point.

Brome, White & Mapes, for plaintiff.

Wigton & Whitham, for defendant.

MAXWELL, C. J. [Omitting recitation of facts.] Does the proof show sufficient ratification, after Emil Koehn became of age, to justify the court in enforcing the contract against him? The decisions upon an infant's liability after he reaches his majority, on a contract made by him during infancy, are directly in conflict.

In *Proctor v. Sears*, 4 Allen, 95, it was held by the Supreme Court of Massachusetts that when an infant had made a promissory note, and after majority he admitted the debt and promised to pay the same, it was not sufficient, as a mere acknowledgment would not have the effect to make the obligation valid.

In 2 Kent Com. 237, it is said: "The books appear to leave the question in some obscurity, when and to what extent a positive act on the part of the infant is requisite."

In *Henry v. Root*, 33 N. Y. 545, it is said: "I think that the course of decision in this State authorizes us to assume that the

narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt after attaining majority, is not sustained by the more modern decisions."

In *Zouch v. Parsons*, 3 Burr. 1794, it was held that a conveyance by a lease and release executed by an infant without livery of seisin was voidable only; Lord MANSFIELD cites Bro. Abr. to prove that the delivery of a deed cannot be void but only voidable; and he adds: "There is no difference in this respect between the feoffments and deeds which convey an interest."

In *Conroe v. Birdsall*, 1 Johns. Cas. 127; s. c., 1 Am. Dec. 105, it was held that the bond of an infant, which takes effect by delivery the same as other deeds, was only voidable, and this rule was affirmed in *Jackson v. Todd*, 6 Johns. 257; *Jackson v. Carpenter*, 11 Johns. 539; *Roof v. Stafford*, 7 Cow. 179.

The question was before the court in *Kleffel v. Bullock*, 8 Neb. 336. That was an action for goods furnished and labor performed, the balance claimed to be due being \$66.90. Cleffel offered to confess judgment for \$40 with costs then accrued; this was not accepted. A trial was had and judgment rendered for a less sum than \$40, and the costs which amounted to a very large sum (more than \$400), were taxed to Bullock. Upon his coming of age he refused to avail himself of the judgment, and the court held that as no guardian had been chosen for him he was not liable for the costs. It is said (page 344): "From analogy to the cases of the ratification of the voidable acts of infants after becoming of full age, we think it clear, that if after reaching his majority, he had either assented to judgment on the verdict or taken a single step in the further prosecution of the action, all the privilege of infancy would thereby have been fully waived and he would have been bound by the action of the court. But the record shows that at the very first opportunity after he reached the age of twenty-one years, he disclaimed all benefit from what had been done in the case and in the most unequivocal manner denied the jurisdiction of the court to proceed further."

In *Philpot v. Sandwich Mfg Co.*, 18 Neb. 54, it was held that contracts of an infant other than for necessities were voidable only, and upon coming of age he had the right to affirm or avoid in his discretion; and in *Ward v. Lavery*, 19 Neb. 431, and *O'Brien v. Gaslin*, 20 Neb. 352, it was held that an infant becoming of age

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must disaffirm a deed within a reasonable time or be barred of the right.

These cases seem to be based upon sound principles. The contract is merely conditional that the infant shall not disaffirm after becoming of age. The law however is to be used as a shield, as a means by which he may be protected against inequitable bargains; it is not designed as a means of enabling him to rob others by procuring and retaining their property without paying for it. The principles of justice apply to an infant as well as an adult; therefore if he purchases real estate and receives a deed therefor, and to secure the consideration he executes a mortgage, upon such land and after coming of age sells the real estate as his own, his plea of the invalidity of the mortgage will be unavailing. That is he cannot confirm that part of the transaction which is beneficial to him and repudiate that which imposes an obligation.

The rule was very carefully considered in *Philpot v. Sandwich Mfg Co.*, *supra*; and it was held in that case that if an infant purchased personal property and gave his promissory note therefor, he cannot, upon arriving at the age of twenty-one years, retain the property and plead infancy as a defense to the note. This, we think, is the correct rule. See also *Delano v. Blake*, 11 Wend. 85; s. c., 25 Am. Dec. 617; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Kitchen v. Lee*, 11 Paige, 107; s. c., 42 Am. Dec. 101; *Lynde v. Budd*, 2 Paige, 191; s. c., 21 Am. Dec. 84; *Deason v. Boyd*, 1 Dana, 45; *Cheshire v. Barrett*, 4 McCord, 241; s. c., 17 Am. Dec. 735; *O'tman v. Moak*, 3 Sandf. Ch. 431.

The plaintiff is entitled therefore to have the mortgage duly established and recorded in the proper records of Pierce county. The value of the property does not appear in this record, and the question of the personal liability of Emil Koehn does not arise in the case.

3. An attempt was made by the proof to show a partial rescission of the contract between Gustav Koehn and the plaintiff; no issue of that kind is made in the pleadings, and we cannot consider it in this collateral proceeding. There is no error in the record and the judgment of the court below is affirmed.

The other judges concur.

Judgment affirmed.

Paxton Cattle Co. v. First National Bank of Arapahoe.

PAXTON CATTLE CO. v. FIRST NATIONAL BANK OF ARAPAHOE.

(7th Neb. 621.)

Corporation — note by promoters before perfecting of organization.

Certain persons drew up and signed articles of incorporation of a cattle company, and before they were filed for record, and before the time fixed for the commencement of the business of the corporation, they selected a president, who in their presence and with their approval executed and delivered to M. a note in consideration of certain property for the corporation, which after the organization was perfected and after the time fixed for the commencement of its business, came into its possession and ownership and was used and enjoyed by it. *Held*, that M.'s indorsee could recover on the note against the corporation.

ACTION on a promissory note. The facts are sufficiently stated in the head-note; also in the last paragraph of the opinion. The plaintiff had judgment below.

John Dawson and Calvin H. Frew, for plaintiff in error.

W. S. Morlan, for defendant in error.

COBB, J. [Omitting statement of pleadings and of evidence.] As I understand the case, there is but one important point involved in it. It is not denied, nor can it be under the pleadings, admissions and evidence, that long before the commencement of this action the plaintiff in error had been in existence both *de facto* and *de jure* as a corporation, under the laws of this State; but the contention is, that the action cannot be maintained, for the reason that the instrument sued on was executed and delivered in point of time nearly one month before the filing and recording of the articles of incorporation of said company, and one day, in point of time, before that provided for in said articles for the commencement of the business of said incorporation. It is not denied that the consideration for which said instrument was given passed to the possession of said corporation and has been retained and enjoyed by it.

I have carefully examined the numerous cases cited by counsel for the plaintiff in error, to the proposition that "there could be no incorporation until the articles of incorporation were filed in the county clerk's office, as there should be a substantial compliance

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with the statute before the corporation could be considered *in esse*." This proposition is sustained by the cases of *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Harris v. McGregor*, 29 Cal. 124; *Douthitt v. Stinson*, 63 Mo. 269, and *Stowe v. Flagg*, 72 Ill. 397; also *Bigelow v. Gregory*, 73 Ill. 197. But these are all cases where parties were sued, either as natural persons or as partnerships, and sought to defend by pleading or proving corporate rights or powers. In all such cases I think it is held that the party alleging or relying upon such corporate existence must prove at least a colorable compliance with all provisions of law upon which such corporate existence is made to depend. In the case at bar the Paxton Cattle Company is sued as a corporation, and sought to be held responsible for corporate acts antedating its legal existence. In other words, it is sought to make it pay for property of which the corporation found itself in possession upon coming into legal existence, and that at a price and upon terms, in the agreeing upon and fixing which it had not, nor could have had, any legal voice.

There are well-recognized principles of law under which this may be done, supported by a line of well-considered cases, both American and English. I will quote from two of these cases, one of which is cited by counsel for plaintiff in error, in which it is held that the promoters of a future incorporation, while the same exists only in prospect, may contract obligations by which the corporation, when legally organized, will be bound.

The case referred to is that of *Bell's Gap Railroad Co. v. Christy*, 79 Penn. St. 54. I quote from the syllabus: "Where a number of persons not incorporated, but associated for a common object, intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he should be compensated, if such acts were necessary to the organization and its objects and are accepted by the corporation and the benefits enjoyed, they must be taken *cum onere* and be compensated for."

In that case, while the court denied the claim of the plaintiff for compensation for his services in making a pioneer survey of a route for a railroad, and procuring a charter for the company, etc., it did so for the reason that such services were procured and acquiesced in by less than a majority of the active promoters of the scheme. In the opinion the court say: "We do not desire to controvert the principles established in England, and to some extent recognized

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in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterward, then if the body for whom the projectors assumed to act does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform."

The case of *Low v. Railroad*, 45 N. H. 370, is quite in point. The leading facts of the case may be shortly stated thus: The legislature of Vermont, in November, 1835, passed an act incorporating the Connecticut and Passumpsic Rivers Railroad Company, with power to construct a railroad from the south boundary of Vermont up the valleys of the Connecticut and Passumpsic to the north line of the State, the capital to be \$2,000,000, and the act to be void unless \$20,000 should be expended on the road within five years. Nothing having been done under the act, by an act of Oct. 31, 1843, the corporation was revived, subject to a similar condition, and Messrs. Fairbanks, Hall and others were appointed commissioners to open books and receive subscriptions to the capital stock of the company. Near the close of the year 1844, for reasons stated in the case, there commenced a great revival of interest in the said line of railroad, and the plaintiff being largely concerned in business in Brantford, Vt., was engaged in the effort to awaken an enterprise of building the said railroad. Says the statement of the case: "The evidence tended to show that he collected maps, charts, and statistics showing the feasibility of the road and the probable amount of transportation upon it; that he was active in getting up meetings, public and private, of those interested at various places where the road was supposed likely to pass, at which meetings he was present and laid before the people assembled the material and data he had collected; and was successful in exciting a general interest and attention to the project. At some of these meetings Mr. Low suggested to the persons present who took the principal lead in the movement of the necessity of some person being employed steadily in visiting and stirring up the people in the different towns interested, in Vermont and New Hampshire, in visiting Boston and Canada, and inviting the attention of the capitalists to the advantages of the road, and generally in forwarding the enterprise; that they all assented to the suggestion and to the urgent need of such exertions, and suggested to Mr. Low that he was the man, and the only man who could successfully accomplish the object.

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Mr. Low stated his anxiety for the road and his willingness to do what he could consistently, with due attention to his business; but that his business was large, requiring almost his whole time, and that he could not afford to devote his time to the railroad, as it was necessary that some one should do. To which they replied that he must make it his business to push forward the road, and assured him if he would do so he should be abundantly compensated for his services and expenses. Mr. Low testified that he always expected to be fully compensated and paid by the railroad company, for his time and labor and neglect of his own business, and that he devoted to this object almost all his time, from Jan. 1, 1845, till the organization of the corporation on the 15th day of January, 1846.

"The gentlemen who gave these assurances to Mr. Low were not corporators named in the charter, and no meeting of the corporation had been held, or association formally admitted; but they were active favorers of the enterprise, intending to become stockholders, and actually taking shares in it when the books were opened.

"The evidence tended to show that Mr. Low visited Boston and spent many weeks there, laboring to enlist the co-operation of men of capital there; that he visited many places in the vicinity of the route, and in Canada, to unite their efforts and encourage subscriptions." There was evidence of other services rendered by Mr. Low of the same general character; also that to enlist the aid of one Harrison Gilmore, of Boston, he agreed to give him his best horse whenever the cars should run into Brantford, and that he accordingly did give him such a horse, which he testified was worth from \$200 to \$250.

"After the organization of the company Mr. Low presented an account to the president, who was also disbursing agent for the company, for his expenses during the time for which his service was charged, which was allowed and paid; and at the same time he stated to the president that he had a claim for his services, and requested that it should be settled. This was not done, and the suit was finally brought for the value of such services and of the horse above referred to.

"The court charged the jury that by the charter all associates are corporators; that by the law of Vermont each corporator is charged with the duty of rendering all necessary service to carry out the provisions of the charter and to effect an organization; and that if any one performs necessary labor, and expends money in the

discharge of such duty, and his action is assented to by the corporators, or being known to them is not objected to, and the corporation is organized and enjoys the benefit of such services, the law implies a promise to pay for them; that every person interested in the object for which an act of incorporation is granted, and who, with the knowledge and without the objection of the corporators, and with the assent and at the request of some of them, shall unite in assisting in the organization of the corporation, with a *bona fide* intention of becoming a member by taking stock, and shall, as soon as books are opened, take stock, by subscribing for shares, is to be deemed an associate from the commencement of his labors, within the purview of the act of incorporation in this case, so far as the liability of the corporation for his services is concerned; that in this case, if some few of the corporators mentioned in the charter requested the plaintiff to perform the services now in suit, or if the greater number of those who, like himself, became associates, and in the manner that he did—by subscribing for stock in the road and becoming members of the corporation, either requested the plaintiff to render such services, or knew of them and assented thereto, he will be deemed to have sufficient authority to render the services, and the law will raise a promise of the corporation to pay for said services, if necessary and reasonable.”

To this instruction the defendant excepted.

“The defendant requested the court to instruct the jury that prior to the organization no person or persons were competent to bind the corporation by contract, express or implied; that prior to the organization it would require the concurrence of a majority of the corporators named in the charter to bind the corporation by contract; that no subscription for stock could make the subscribers associates within the meaning of the charter before organization; that no intention to subscribe for stock, nor any acts done in furtherance of the objects of the enterprise could have that effect; that no one would become an associate within the meaning of the charter except after the organization, by being a subscriber for stock; that the corporation would be bound by no implied contract arising before organization; that the plaintiff is not entitled to recover any thing on account of the horse delivered by him to Addison Gilmore, nor for the service performed at Montpelier in procuring a division of the charter, being of the kind called ‘logrolling.’” * * *

The court declined to give this instruction, to which the defendant excepted.

"But the court did instruct the jury that the corporation would be bound to pay for the horse delivered to Gilmore if they found upon consideration of all the evidence, and the nature of the employment, that Low was authorized to make such a contract in behalf of the corporation and did so make it, and not otherwise * * * The jury returned a verdict for the plaintiff which the defendants move may be set aside by reason of the preceding exceptions."

The court in the opinion say: "The great question is, whether the plaintiff is entitled to recover of the incorporation, in any form, for services rendered by him antecedent to its organization, but which were necessary to enable it to complete that organization, and if so, whether the action of *assumpsit* can be maintained.

"In considering the first question it will be assumed for the present that the services were necessary, that they were rendered at the request of one or more of the original corporators or of those who were associated with them, and that the corporation accepted those services after its organization, and enjoyed the benefits of them. Under such circumstances we are inclined to the opinion that it would become the duty of the corporation to pay for such services, and that in some form this duty could be enforced.

* * * * *

"In such case it can avail nothing by way of defense, to show that in fact the party had no capacity to make such antecedent request, or to bind himself by a contract, as in the case of a corporation that was not organized at all, or imperfectly, any more than to show that in point of fact there was no such request or contract made. But the promise is implied by law from the fact that the party, when it had capacity to contract, has taken its benefits, and therefore must be deemed to have taken its burdens at the same time; and he is estopped to controvert it either by showing a want of capacity to make a contract, or that none in fact was made. Upon the same principle a person entering into a contract with a corporation in their corporate name is estopped to deny that it is duly constituted. * * * The case of an infant is in point. He has not capacity to bind himself by a contract, except for necessities, but if after he arrives at full age he apply the goods to his use he is bound to pay as he had promised. So here if the corpo-

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ration, after its organization, has elected to receive the benefit of services rendered for it prior to such organization, the law may well imply a promise to make reasonable compensation for them."

I have quoted at great length from the above case because it seems to be very nearly or quite in point to the case at bar. When under a general incorporation law, persons have drawn up and signed articles of incorporation, but have not yet filed them in the office of the county clerk, the *status* of the corporation is the same, where under a different constitutional provision, a charter has been granted by special legislative enactment, but no organization has been effected under it.

From the agreed statement of facts above set out, it appears that after the articles of incorporation had been drawn up and signed by all of the promoters of the scheme and a full set of officers for the corporation had been elected, but before the said articles were filed in the county clerk's office, and before the time fixed for the commencement of the business of the corporation, the said officers and promoters entered into a contract with Meserve for the purchase on the part of the corporation of the cattle, horses, ranch, claims and other property in Chase county, as stated in the agreed statement of facts, and in part payment therefor, by the president elected for said corporation, executed and delivered to him the note sued on. It is very clearly shown, both by the agreed statement of facts and other evidence, that the organization of the said Paxton Cattle Company was afterward perfected by the filing of their articles of incorporation in the county clerk's office of Red Willow county, and that the company, through its officers and manager, has retained the possession of the property in Chase county, both real and personal, for which the said note was given. This, under the authority of the foregoing cases, is the turning point in the case, and I think the conclusion is inevitable, granting the entire want of power on the part of the officers and promoters of the corporation to act as such at the date of the note, that the retaining possession of the consideration by the corporation after its organization is a ratification of the contract with all of its terms and obligations.

[Minor points omitted.]

The judgment of the District Court is affirmed.

Judgment affirmed.

The other judges concur.

In re Groff.

IN RE GROFF.

(21 Neb. 647.)

Constitutional law — statute void only in part.

A statute was passed in due form to reapportion the State into judicial districts, but before being signed by the governor was so changed as to reduce the number of judges in the second district to one, which was contrary to the Constitution. *Held*, that the statute being complete and capable of execution as to the other districts, it was valid as to them.

THE opinion states the case.

William Marshall and John H. Ames, for petitioners.

MAXWELL, C. J. This case is submitted to the court upon an agreed statement of facts, and as the action is real and the facts agreed upon appear to bring the case within the provisions of section 567 of the Code of Civil Procedure, it is our duty to consider it and render a decision upon the questions involved. The agreed statement is as follows:

“To the Honorable, the Judges of the Supreme Court of the State of Nebraska:

“Your petitioners, the undersigned, respectfully represent and show unto your honors, that pursuant to the annexed act of the legislature of this State your petitioners, Lewis A. Groff and M. R. Hopewell, have been by the governor of this State duly appointed each as one of the judges of the District Court for the third judicial district of this State, and have duly qualified and entered upon the discharge of their duties as such; and that in like manner and pursuant to the same authority your petitioner, William Marshall, has been appointed and has qualified and entered upon the discharge of his duties as one of the judges of the District Court for the fourth judicial district; and that in like manner your petitioner, T. O. O. C. Harrison has, pursuant to the same authority, been appointed and has qualified and entered upon the discharge of his duties as one of the judges of the ninth judicial district; that your petitioner, Stephen B. Pound, was duly elected judge of the District Court of the second judicial district at the general election in October, 1875, and has since been twice elected

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to said office upon the expiration of his term, so that he has held said office continuously from the date of his said first election down to the present time, and still does continue to occupy and enjoy the same; and that pursuant to an act passed and approved March 10, 1885, the Hon. Samuel M. Chapman was, at the general election in November, 1886, duly elected to the office of additional judge in said second judicial district, and has since duly qualified and entered upon his duties as such, and still continues to hold and enjoy said office.

"And your petitioners further show unto your honors that at the twentieth session of the legislature of this State the only appropriation made for the payment of salaries of judges of the District Court was as follows:

" 'H. R. No. 446.

" 'An act to provide for the payment of the salaries of the officers of the State government,

* * * *

" 'DISTRICT COURT.

" 'Salary of nineteen judges at \$2,500.....\$47,500 \$95,500

" 'Salary of nineteen stenographers at \$1,500 ... 28,500 57,000.'

"And your petitioners further show that certain doubts and controversies have arisen as to the validity and construction of the above-mentioned acts of the legislature, insomuch that the titles of your said petitioners and of said Chapman to their respective offices have been drawn in question, and as to the right of your petitioner to receive and draw their respective salaries as incumbents of said offices, and as to the duty and authority of your petitioner, H. A. Babcock, auditor of State, to draw and deliver his warrant upon the treasurer of the State for the payment of same.

"And your petitioners further show that said doubts and controversies have arisen from the following facts appearing upon the legislative records of this State, to-wit:

"First. That said act first herein mentioned was introduced into the senate at said twentieth session as a measure entitled, 'Senate File No. 174. A bill for an act to apportion the State into judicial districts, and for the appointment and election of officers thereof.' That by the bill so introduced the county of Lancaster, being a part of the territory theretofore comprised in the second judicial district, was constituted a district by itself, bearing that number, and the counties of Cass and Otoe, being the remainder of said ter-

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ritory, were constituted a district by themselves and numbered the eleventh, and by a proviso it was declared that in each of said districts there should be one judge, and that in the first, fourth, ninth and seventh districts each, there should be two judges; that afterward by amendment, the clause creating said eleventh district was stricken out and the counties of Cass and Otoe restored to the second district: that thereafter the bill was by the house so amended as to strike the said first district from the clause providing that in each of certain districts there should be two judges; that thereafter the bill was so amended by the house that the second district was inserted in the clause of the bill providing that in each of certain districts there should be two judges, and that thereafter a further amendment was made by the house by which the first district was also inserted in said clause, and that as so amended the bill was passed by the house and concurred in by the senate and ordered to be enrolled so as to incorporate both of said amendments; but that by some fault or oversight, the amendment including the second district in said clause was omitted by the person or persons intrusted with the enrolment thereof, so that the same was by inadvertence presented to the governor and signed by him without said omission having been discovered.

“Second. That said first-mentioned act does not in express terms repeal or refer to said act of March 10, 1885.

“Your petitioners therefore respectfully pray that your honors will take into due consideration and advise your petitioners upon the following matters touching this present inquiry, and necessary for your petitioners to be informed upon in order that grave and important interests, both of the public and of individuals, may not be put in jeopardy.

“I. Is the said first-named act valid for any purpose or to any extent?

“II. Is said act, on account of said amendment being omitted in enrolment, invalid as respects the second judicial district alone?

“III. If said act is not invalidated, either as a whole or as respects said second judicial district, on account of the omission of said amendment, does the same amend, repeal, or supersede the provisions of the act of March 10, 1885, creating an additional judge in the second judicial district? *Smails v. White*, 4 Neb. 353.

“V. The object of this act being to increase the number of the district judges in the State, was it competent for the legislature by

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that measure to 'vacate the office of any judge?' Section 2, art. VI, of the Constitution.

"VI. The Constitution having made appropriation to pay the salaries of all the judges whose offices were created by that instrument, should not the legislative appropriation be treated as in addition thereto and intended to provide for the payment of the salaries of judges whose offices are created by law? *State v. Weston*, 4 Neb. 216.

"VII. The office of the district judge being created by law, does not the Constitution appropriate the salary therefor in the same manner as that for the six judges whose offices were created by the Constitution?

"VIII. Should not the legislative appropriation for salaries of district judges and stenographers be treated as an appropriation in gross to be drawn upon without reference to apportionment to particular district?

"*Lewis A. Groff, M. R. Hopewell, William Marshall, T. O. C. Harrison, S. B. Pound* — By *John H. Ames, G. M. Lamberton*, Attorneys.

"*S. M. Chapman* — By *C. W. Cavell, J. B. Strode*, Attorneys.

"*H. A. Babcock*, Auditor P. A."

The statute to apportion the State into judicial districts is as follows:

"S. F. 174.

"An act to apportion the State into judicial districts, and for the apportionment and election of officers thereof.

"*Be it enacted by the legislature of the State of Nebraska:*

"SECTION 1. The State of Nebraska shall be divided into twelve judicial districts, as follows:

"First district — Richardson, Nemaha, Johnson, Pawnee and Gage counties.

"Second district — Lancaster, Otoe and Cass counties.

"Third district — Douglas, Sarpy, Washington and Burt counties.

"Fourth district — Saunders, Butler, Colfax, Dodge, Platte, Merrick and Nance counties.

"Fifth district — Saline, Jefferson, Fillmore, Thayer, Nuckolls and Clay counties.

"Sixth district — Seward, York, Hamilton and Polk counties.

"Seventh district — Cuming, Stanton, Wayne, Dixon, Dakota, Madison, Antelope, Pierce, Cedar and Knox counties, Winnebago

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and Omaha reservations, and the unorganized territory north of Knox county.

“Eighth district — Adams, Webster, Kearney, Franklin, Harlan and Phelps counties.

“Ninth district — Boone, Hall, Wheeler, Greeley, Garfield, Loup, Valley, Howard and Blaine counties, and the unorganized territory west of Blaine county.

“Tenth district — Buffalo, Dawson, Custer, Lincoln, Logan, Sherman, Keith and Cheyenne counties, and the unorganized territory west of Logan county.

“Eleventh district — Gosper, Furnas, Frontier, Red Willow, Hayes, Hitchcock, Chase and Dundy counties.

“Twelfth district — Holt, Brown, Keya Paha, Cherry, Sheridan, Dawes, Sioux and Box Butte counties, and the unorganized territory north of Holt and Keya Paha counties.

“*Provided*, That in the third district there shall be four judges of the District Court; that in each of the following districts, to-wit: first, fourth, seventh and ninth districts, there shall be two judges of the District Court, and in each of the other of said districts there shall be one judge of the District Court. All judges shall be elected for the term of and hold their office for four years from and after the first day of January next succeeding their election. The said judges shall be elected at the general election to be held in November, A. D. 1887, and every four years thereafter. Such judges shall have equal power, and shall each perform such duties as are now provided by law, or such as may hereafter be imposed upon them by law, and it shall be the duty of such judges to so divide and arrange the business of said court between them that the trial of causes may be speedy. In each district having more than one judge of the District Court, there shall be drawn in the manner now provided by law a panel of forty-eight jurors to serve as jurors in such court; *Provided*, That in any county in such districts where such number of jurors may not be required, the judges may, by appropriate rule, provide for the drawing of a less number; and *Provided, further*, When there shall be more than two judges of the District Court in any one district, they may provide, by appropriate rule, for the drawing of a greater number of jurors.

“Sec. 2. The judges now in office shall hold their position and perform the duties of their office in the districts hereby created in

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which they may reside, until the expiration of the term for which they were elected.

"Sec. 3. The governor shall appoint judges to fill all vacancies created by this act, including the additional judges as provided in section 1 of this act, who shall hold their office until the next general election, when such vacancies shall be filled by election in same manner as such officer is elected in other districts.

"Sec. 4. All acts or parts of acts in conflict with the provisions of this act are hereby repealed.

"Sec. 5. Whereas, an emergency exists, this act shall take effect and be in force from and after its passage.

"H. H. SHEDD,

"Attest:

"*President of the Senate.*

"WALT. M. SEELY,

"*Secretary of the Senate.*

"N. V. HARLAN,

"*Speaker of House of Representatives.*

"Attest:

"BRAD. D. SLAUGHTER,

"*Chief Clerk of House of Representatives.*

"Approved March 31, 1887.

"JOHN M. THAYER,

"*Governor.*"

The testimony before us shows that the provisions of the above act as here set out, so far as they relate to all the districts except the second, were properly passed by both houses of the legislature and signed by the governor; that as to the second district, the provision relating thereto as passed by both houses provided for two judges, but that the bill as signed by the governor contained a provision for only one judge.

Three questions necessarily arise out of the facts stated:

First. Does the invalidity of the provision as to the second district affect the whole act and render it void?

In *State v. McLelland*, 18 Neb. 237, it was held that when a bill providing that in each county containing not less than "15,000" inhabitants, a register of deeds should be elected, etc., had passed both houses of the legislature, but before being signed by the governor had been changed to read "1,500" and signed in that form, was of no force or effect; and the same ruling was had in *State v. Robinson*, 20 Neb. 96. These cases were argued by able attorneys

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and were carefully considered, and the conclusion reached, in our view, is the correct one and it will be adhered to.

But do these decisions affect the entire bill in this case? In those cases it will be observed that there was but a single question involved, viz.: A register was to be elected in each county containing not less than fifteen thousand inhabitants. In the case at bar however there are twelve distinct, minor subjects or propositions, embraced in the bill; each proposition prescribes the extent of territory comprising a judicial district and the number of judges to preside therein. In effect there are twelve bills all embraced in one title, dividing the State into judicial districts and providing for judges in such districts. It will be seen therefore that a defect in one proposition does not necessarily affect or defeat the others.

This question was before the Supreme Court of South Carolina in *State v. Platt*, 2 Rich. 150. On the 1st of March, 1870, the legislature of that State passed an "act to revise, simplify, and abridge the rules, practice, pleadings and forms of courts in that State." The nineteenth section of the enrolled act, to which the great seal of the State was affixed, and which was signed in the senate chamber by the president of the senate and the speaker of the house of representatives, and received the approval of the governor, provided that the courts for the county of Barnwell should be held at Barnwell; but it appeared by the journals of the two houses of the general assembly that the same section of the bill, as it finally passed both houses, provided that the courts for that county should be held at Blackville. By the law as it stood at the passage of the act the last-named place was the county seat of Barnwell county. The court held that the nineteenth section of the act was void, and consequently that Blackville remained the county seat of Barnwell county. It is said (p. 155): "In order to determine whether an act has passed through all the requisite stages of legislative progress, its identity in each of these stages must be determined. If the formalities of enrolment do not prevent us from looking into the journals in order to see that the bill had its proper reading, of what value will that be to us if we are estopped by the enrolment from inquiry as to what bill the journals have relation? To give full force and effect to the Constitution, if an issue of identity is raised, we must look into the bill or act at each step of its progress, to determine that that which has received part of the formalities requisite to its validity as a law is the same with that which has received the resi-

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due of such formalities. Hitherto this question has been considered in the simplest form in which it is likely to arise, that is, upon the supposition that the act, regarded as a whole, is not the same, as appearing by the enrolment, with that which passed through the preceding stages of enactment. In regard to this assumed case, we have no doubt but that we may look at the journals for the purpose of ascertaining the action of the houses, and into any evidence that may be appropriate to show the nature of the bill, the subject of such action. A more difficult question here presents itself. When as in the present case, the act, as a whole, has unquestionably passed through all the requisite stages, but some part, either of a section or clause, or as in the case at hand, mere word, is found to constitute the difference between the act in its different stages of progress, it is necessary to look beyond the expression of the Constitution to its substantial meaning and extent. As regards the general question, it is much simplified by the fact that the alleged error does not affect the general integrity or efficiency of the act, nor enter into any of the limitations and conditions by which the legislature sought to bound the scope and sphere of its provisions." That portion of the act which has been passed properly was sustained. To the same effect is *Jones v. Hutchinson*, 43 Ala. 725; *Peterman v. Huling*, 7 Casey, 436.

In *State v. Lancaster County*, 6 Neb. 474, it was held that if the constitutional portion of a statute was not dependent upon that which was unconstitutional, and was complete in itself and capable of being executed, it will be maintained. In that case the title of the bill was "An act to provide for township organization. Under that restrictive title the act provided for county officers, defined their duties, and provided for county organization and defined the corporate powers of a county.

The same rule was applied in *White v. City of Lincoln*, 5 Neb. 515, where a portion of an act was sustained and a portion rejected as not conforming to the constitutional requirements; and so in *Holmburg v. Houck*, 16 Neb. 338; *State v. Lancaster County*, 17 Neb. 85; *State v. Hurds*, 19 Neb. 316, and *Ex parte Thomason*, 16 Neb. 239. We hold therefore that where a part of an act is not dependent upon that which is unconstitutional, and is complete in itself and capable of being executed, it will be maintained. So far as this act affects the eleven districts spoken of it fully complies with these conditions, and as to such districts must be sustained.

[Omitting minor questions.]

Furrow v. Athey.

FURROW v. ATHEY.

(21 Neb. 371.)

Marriage — deed from husband to wife — homestead.

A deed of lands is not invalid because executed by a husband directly to his wife, nor because it conveys a homestead, a conveyance of which is by statute required to be executed by both husband and wife.

THE opinion states the case.

A. *Schoenheit*, for appellants.

A. H. *Babcock*, E. W. *Thomas*, and E. A. *Tucker*, for appellees.

RESE, J. The first question presented in this case is, whether a husband can convey his real estate to his wife without the intervention of a third party as a trustee, in a case where no fraud is shown, and the rights of creditors or other third parties do not intervene.

As has been decided by this court, the deed from husband to the wife was void by the common law. But in equity such deeds have been upheld when any equitable reason therefor was shown. *Smith v. Dean*, 15 Neb. 442; *Johnson v. Vandervort*, 16 Neb. 144.

There is some evidence tending to prove a valuable consideration for the deed in question, growing out of money received by the wife from her separate property, and given to the husband. If this was true it would raise an equity in favor of the wife which would support the deed. There is sufficient evidence to sustain the finding of the court upon this point, and the decree could not therefore be molested. But aside from this we can see no reason why the decree of the District Court is not correct.

It appears that in 1868 Charles Furrow, the husband, now deceased, purchased the land in question from the United States. At that time he, with defendant, his wife, settled upon it, and they resided there together until his death, which occurred in 1880. In 1879, while in poor health, he conveyed the premises to her. It was their home. They had a family of children, the plaintiffs, and the deed was evidently executed to her in order that she might be enabled to rear and educate the family in which she was as much

Furrow v. Athey.

interested as the husband, and which he fully understood at the time he made the conveyance. If it had been made to a third party as a trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention. *Huber v. Huber*, 10 Ohio. St. 373; *Garlick v. Strong*, 3 Paige, 452; *Coaste v. Gerlach*, 44 Penn. St. 43; *Story v. Marshall*, 24 Tex. 305; *Baker v. Koneman*, 13 Cal. 9; *Deming v. Williams*, 26 Conn. 226; s. c., 68 Am. Dec. 386; *Brookbank v. Kennard*, 41 Ind. 339; *Hunt v. Johnson*, 44 N. Y. 27; s. c., 4 Am. Rep. 631; *Eddins v. Buck*, 23 Ark. 507; *Wilder v. Brooks*, 10 Minn. 50; s. c., 88 Am. Dec. 49.

It is next contended that the deed was void under the provisions of chapter 36 of the Compiled Statutes, and particularly under section 4 of said chapter, the property being the homestead at the time of the conveyance. Section 4 is as follows: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Statutes creating the homestead right were enacted for the protection of the family of the husband or wife, if the head of the family were a debtor, and for the protection of the husband or wife against a conveyance or incumbrance by the other. Both can join in a conveyance, and by it the right of the children or other members of the family may be entirely destroyed; but where the title is held by the husband, he cannot sell without the consent of the wife expressed by signing and acknowledging the deed. The same rule applies to the wife where the title is held by her. In effect, an estate or interest in the land is created, of which the party not named in the deed cannot be divested by the sole act of the other. But in the case at bar no effort was made to divest the wife of her estate or right. That remained unimpaired. I can see no reason why she should be required to execute the deed to herself in order to its validity. Neither do I find any authority for such a holding. The reverse seems to be the rule. *Thompson Homesteads*, 473; *Reihl v. Bingenheimer*, 28 Wis. 84.

The decree of the District Court is affirmed.

Decree affirmed.

The other judges concur.

INDEX.

ACTION.

Privilege of party from suit while returning from trial.] One charged with a criminal offense in another county than that of his residence, and who on the trial is discharged, is privileged from civil suit in that county until the lapse of a reasonable time to enable him to return home. *Palmer v. Rowan* (31 Neb. 452), 844.

See CORPORATION, 86; EXECUTOR AND ADMINISTRATOR, 423; OFFICE AND OFFICER, 9.

AGENCY.

Broker — power to sell.] M. was a broker who procured diamonds from larger dealers to sell to his customers. He procured from plaintiffs, dealers in diamonds, some diamonds for a customer, giving a receipt stating that they were received by him on approval to show to his customer, and to be returned to plaintiff "on demand." The defendant purchased them from M. in good faith, supposing him the owner. He had previously purchased from M. and paid him for two other lots of diamonds obtained by M. from the plaintiff in the same way. *Held*, that defendant got good title to the diamonds. *Smith v. Closs* (105 N. Y. 233), 502.

See CONTRACT, 541; CORPORATION, 571.

ANIMALS.

See CONSTITUTIONAL LAW, 529.

APPLICATION OF PAYMENTS.

See STATUTE OF LIMITATIONS, 787.

ASSAULT.

See CRIMINAL LAW, 232, 776.

ASSIGNMENT FOR CREDITORS.

- 1. Authority to compromise.]** An assignment for the benefit of creditors is not invalidated by giving the assignee authority to compound or compromise debts owing to the assignor. *Bagley v. Boice* (105 N. Y. 171), 498.
- 2. To sell on credit.]** Authority to the assignee to execute bills of sales or other conveyances, "for such consideration in money or other things" as

ASSIGNMENT FOR CREDITORS — *Continued.*

he should deem sufficient, is not an authority to exchange or sell on credit. *Id.*

3. Creditors secured by mortgage.] Where a mortgagor assigns all his property for the benefit of his creditors, the mortgagee may share equally with unsecured creditors. *Matter of Bates* (118 Ill. 524), 883.

See CONFLICT OF LAWS, 489, 617.

ATTORNEY AND CLIENT.

See CHAMPERTY AND MAINTENANCE, 99.

BAILMENT.

Custom saw-mill.] When one delivers logs at a custom saw-mill to be sawed at an agreed price, the owner of the mill becomes bound to exercise ordinary care in keeping and manufacturing the logs, and in case of their loss to prove that it was without his fault. *Gleason v. Beers* (59 Vt. 581), 757.

BANKS.

Partner making individual deposit — bank owning partnership debt — set-off.] A bank may not set off an individual deposit against a partnership debt, and the partner may lawfully appropriate such deposit to a *bona fide* creditor by check. *International Bank v. Jones* (119 Ill. 407), 807.

BOARD OF HEALTH.

See CONSTITUTIONAL LAW, 118.

BOND.

Surety — conditional delivery.] Where sureties signed a school treasurer's bond on condition that it should not be delivered until signed by him, but it was delivered without his signature, although his name appeared in the condition and obligation, the obligee may recover on it in absence of proof of notice or knowledge of the condition of delivery, or of facts tending to put a prudent man on inquiry. *Trustees of Schools v. Sheik* (119 Ill. 579), 880.

BOUNDARIES.

See EVIDENCE, 240.

BOYCOTTING.

See CRIMINAL LAW, 710.

BREACH OF PEACE.

See CRIMINAL LAW, 755.

BROKER.

See AGENCY, 502; DAMAGES, 883.

CARRIER.

1. Contributory negligence of passengers on street car — walking before car stops.] *President, etc., v. Leonhardt* (66 Md. 70), 156.
2. Passenger — baggage — large amount of gold coin of county treasurer — statute — "messenger" — express facilities.] A railroad company is not

CARRIER — *Continued.*

bound to carry a large amount of gold coin as luggage of a passenger, although he is a county treasurer on his way to pay such coin to the State treasurer, and although it has carried such coin as luggage of such officers for some years, and although it allows an express company on the same train to carry such coin for hire. A county treasurer so carrying coin is not a "public messenger." *Pfister v. Central Pacific Railroad Co.* (70 Cal. 169), 404.

3. — ejection — contributory negligence.] A railway passenger was ejected from a car at one end of a trestle, and his gun, which was in the baggage car, at the other. He crossed to get it, and in returning, fell and was injured: *Held*, that the company was not liable therefor. *I. & G. N. Railway Co. v. Folliard* (66 Tex. 603), 682.
4. — presumption from accident — contributory negligence.] A public stage coach was overturned by the breaking of a wheel. The plaintiff, a passenger, leaped from the coach and was injured. *Held*, (1) that the accident, unexplained, fastened liability on the carrier; (2) that the plaintiff was not negligent if he did what persons of ordinary prudence would have done in the same circumstances. *Lawrence v. Green* (70 Cal. 417), 428.
5. Railroad — duty of passenger to go inside car.] It is the duty of a passenger standing on the platform of a steam railroad car to go inside the car when requested so to do by a trainman, if there is standing room inside, although there are no vacant seats. *Graville v. Manhattan Railroad Co.* (105 N. Y. 525), 516.

See INSURANCE, 163; SLEEPING-CAR COMPANY, 58.

CHAMPERTY AND MAINTENANCE.

- Agreement for contingent fees.]** A contract by which an attorney depends on the contingency of success for payment for all services, and the client agrees to furnish evidence and pay all actual costs, and that the attorney shall be entitled to large and liberal fees, not to exceed fifty per cent of the amount collected, is not champertous nor void for maintenance. *Blaisdell v. Ahern* (144 Mass. 393), 99.

CLUB.

See SALE, 287.

CONFLICT OF LAWS.

1. **Assignment for creditors.]** A general assignment for the benefit of creditors, made in accordance with the laws of the debtor's domicile, will carry his personal property situated in other States, in the absence of express enactment in such States. *Weider v. Maddox* (66 Tex. 373), 617.
2. —.] The validity of an assignment of lands for the benefit of creditors must be determined by the law of the State where the lands are situated. *Moore v. Church* (70 Iowa, 208), 439.
3. — estoppel.] Where parties to an assignment for creditors all live in New York, and the assignment is valid there but invalid in Iowa, the New York creditors are not estopped from denying its invalidity in Iowa. *Id.*

See EXECUTOR AND ADMINISTRATOR, 550; USURY, 702.

CONSPIRACY.

See CRIMINAL LAW, 710.

CONSTITUTIONAL LAW.

1. **Commerce — discrimination in railroad freights.]** A statute imposing a penalty on any railroad which shall charge, for the transportation of any freight over its road, a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other States. *Freight Discrimination Cases* (95 N. C. 428), 247.
 2. **Police regulations — board of health — disinfecting rags.]** A regulation of the board of health of a city, passed under legislative authority, and ordering "that on and after this date all rags arriving at this port from any foreign port shall, before being discharged, be disinfected under the supervision of an officer of this board, and in a manner satisfactory to this board," is not unreasonable nor unconstitutional. *Train v. Boston Disinfecting Co.* (144 Mass. 538), 118.
 3. **Statute — oleomargarine.]** *People v. Arensberg* (105 N. Y. 123), 488.
 4. **— void only in part.]** A statute was passed in due form to reappportion the State into judicial districts, but before being signed by the governor was so changed as to reduce the number of judges in the second district to one, which was contrary to the Constitution. *Held*, that the statute being complete and capable of execution as to the other districts, it was valid as to them. *In re Greff* (31 Neb. 647), 859.
 5. **Taxation and regulation of dogs.]** Statutes and ordinances regulating, restricting or prohibiting the running of dogs at large in cities, and authorizing the summary killing of dogs so running at large, and dividing them into classes with different fees for registration, are constitutional. *State v. City of Topeka* (36 Kans. 76), 529.
 6. **Working out taxes.]** The imposition of labor on the streets of cities in payment of taxes is valid. *Id.*
 7. **Taxation of drummers.]** *Ex parte Asher* (23 Tex. Ct. App. 662), 783.
- See CRIMINAL LAW, 146; ELECTIONS, 105; HOMESTEAD, 648; TAXATION, 263.

CONTEMPT.

Newspaper comment on past case.] Libellous newspaper comment on judicial proceedings in concluded cases may not be treated as contempt. *Oheadle v. State* (110 Ind. 801), 199.

CONTRACT.

1. **Implied — by corporation to pay for use of patent of director.]** Where a corporation appropriates and uses a patent owned by one of its directors and officers, with his consent, he is not precluded from recovering compensation upon an implied contract. *Deans v. Hodge* (35 Mian. 146), 321.
2. **— with insane person.]** A daughter may recover, as upon an implied contract, for necessary services rendered by her to her insane mother with the intention of charging for them. *Reando v. Misplay* (90 Mo. 251), 13.

CONTRACT — *Continued.*

3. **For benefit of party and third person — part performance — rescission.]** If A. delivers to B. bonds for two distinct considerations, the first for the benefit of a third person, but effecting advantage to A., and the second for A.'s own direct benefit, and B. performs the first but not the second, A. cannot, without returning the benefit, rescind the contract, and maintain conversion for the bonds, although B. when he entered into the contract, fraudulently intended not to perform the second consideration, and although the benefit received by A. from the performance of the first consideration is of such a nature that it cannot be returned. *Snow v. Alley* (144 Mass. 546), 119.
4. **To launder and return goods — lien — payment.]** Plaintiff contracted with H. to launder all the collars and cuffs manufactured by the latter, at a price specified; to return the goods as fast as laundered and to render a bill and receive payment in cash on the first of each month for all goods laundered and returned. *Held*, that plaintiff had no right of lien either for the balance due him or for the work done on the goods in his hands. *Wiles Laundering Company v. Hahlo* (105 N. Y. 234), 496.
5. **When third person not authorized to sue.]** A contract by which B. agrees to furnish C. "necessary money to pay his current expenses," such money being a loan, does not authorize a person furnishing goods to C. to sue B. therefor, nor constitute C. the agent of B. as principal debtor. *Burton v. Larkin* (36 Kans. 246), 541.

See PARTIES, 758.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

1. **Contract — ultra vires — estoppel.]** A corporation organized for a "general freight and transfer business" has no power to become surety nor to assume the principal's debt, and is not estopped by such assumption, made by its officers without the authority of the directors or stockholders. *Lucas v. White Line Transfer Co.* (70 Iowa, 541), 449.
2. **—.]** A fire insurance company having insured against hail, which it was not authorized to do, the insured having performed his part of the contract and the company having accepted the benefit, the company is estopped to set up its want of power to issue such a policy. *Denver Fire Insurance Co. v. McClellan* (9 Colo. 11), 184.
3. **Debt of insolvent corporation to directors beyond prescribed limit — preference.]** Where a debt of a corporation beyond the limit prescribed by its charter was held by its directors, and they in good faith took a mortgage on the property of the corporation for security, they may enforce such security, even though they participated in the management of the corporate business in such a way as to permit the accumulation of the debt beyond the allowed limit, and though the corporation was insolvent

CORPORATION — *Continued.*

- when the mortgage was taken, and the mortgage gave them a preference over other creditors. *Garrett v. Burlington Plow Co.* (70 Iowa, 69), 461.
4. **False imprisonment — damage — agency.]** A corporation may be held liable for a false imprisonment procured by the wrongful acts of its agents and servants in the course of their employment, although it neither authorized nor ratified such acts. *Wheeler and Wilson Manufacturing Co. v. Boyce* (36 Kans. 350), 571.
5. **Foreign — suit for discovery.]** A corporation of another State, having there obtained a judgment against another corporation of that State, may maintain a bill in equity here against the officers of the debtor corporation, for discovery of the names of its stockholders and of the number of shares held by each, if the officers reside in this Commonwealth and the books of the corporation are kept here, in order, by a suit in the other State, to enforce a personal liability of such stockholders. *Post v. Toledo, Cincinnati and St. Louis Railroad Co.* (144 Mass. 341), 96.
6. **Note by promoters before perfecting of organization.]** Certain persons drew up and signed articles of incorporation of a cattle company, and before they were filed for record, and before the time fixed for the commencement of the business of the corporation, they selected a president, who in their presence and with their approval executed and delivered to M: a note in consideration of certain property for the corporation, which after the organization was perfected and after the time fixed for the commencement of its business, came into its possession and ownership and was used and enjoyed by it. *Held*, that M.'s indorsee could recover on the note against the corporation. *Paxton Cattle Co. v. First National Bank of Arapahoe* (21 Neb. 621), 852.

See CONTRACT, 831.

COVENANT.

Personal — restraint of trade.] Tolbert, owning three hundred and sixty-eight acres of land at a railway junction, sold five and one-half acres thereof to Tardy, with exclusive mercantile privileges at, in, and around the junction, including the exclusive right to sell goods, wares and merchandise; to keep houses of public entertainment and refreshment; to establish and erect warehouses, factories, foundries and shops on the tract of three hundred and sixty-eight acres, and providing that the said covenants should apply to his heirs or assigns, who might be deprived of these privileges, and should run with the said land of Tolbert to whomsoever it might be devised or conveyed. Subsequently Tolbert conveyed one acre to Roach, "restricting him from any mercantile privilege, the same having been conveyed to Tardy." Roach conveyed the same with general warranty; without restriction to Creasy, who established a mercantile business thereon. On a bill by Tardy to enjoin Creasy from selling goods, etc., on said acre, *held* that. (1) These covenants are personal, binding the grantor; (2) They do not run with the land; (3) They are in general restraint of trade and void as against public policy. *Tardy v. Creasy* (81 Va. 558), 676.

CRIMINAL LAW.

1. **Arson — firing jail.]** If a prisoner fires a jail to escape, it is arson. *Smith v. State* (28 Tex. Ct. App. 357), 773.
2. **Assault — parent on child.]** A parent's corporeal chastisement of his child, however severe and unmerited, will not be criminally punished "as excessive or cruel," if it was honestly inflicted, without malice, and did not produce permanent injury. *State v. Jones* (95 N. C. 588), 282.
3. **— school teacher.]** A school teacher may moderately chastise a scholar for fighting, against the school rules, although away from the school-house and not in school hours. *Hutton v. State* (23 Tex. Ct. App. 386), 776.
4. **Body-snatching — disinterment by authority of coroner.]** On application of defendant, and on affidavits sufficient to give jurisdiction, a coroner directed the exhumation of a body for the purpose of a *post-mortem* examination to determine whether the deceased was murdered, and the body was accordingly exhumed and a public examination had without impanelling a jury. *Held*, not body-stealing. *People v. Fitzgerald* (105 N. Y. 146), 488.
5. **Breach of peace — intent.]** A statute provides that a person who "disturbs or breaks the public peace by tumultuous and offensive carriage," etc., shall be punished. An indictment charged in one count that the defendant "did disturb and break the public peace by his tumultuous carriage," etc., and in another that he "quarrelled with the said Day, by cursing and swearing at the said Day, and by calling him opprobrious, indecent and obscene names," and alleged that it had the effect to disturb the public peace. *Held*, valid. *State v. Archibald* (59 Vt. 548), 755.
6. **Conspiracy — boycotting.]** If two or more persons combine to prevent, by violence and intimidation, an employer from retaining or employing certain persons, or employees from entering into his service, it is a criminal conspiracy at common law. The indictment need not set forth the means, nor the defendants' guilty knowledge. *State v. Stewart* (59 Vt. 278), 710.
7. **Delivering intoxicating liquors — express agent — knowledge.]** An express agent delivered a C. O. D. package containing lager beer to the consignee, who paid him a sum of money to be transmitted to the consignor, and the agent was criminally prosecuted for selling, furnishing and giving away intoxicating liquor without authority. On trial the court instructed the jury that it was immaterial whether he knew what the package contained or not. *Held*, that an express carrier, in the absence of suspicious appearances or circumstances, is neither presumed to know nor authorized to find out, as a condition of receiving it, what a package contains that is offered for carriage, and the agent was not liable. *State v. Goss* (59 Vt. 102), 706.
8. **Disorderly houses — general law and city ordinance.]** Where the charter of a city gives it exclusive power to prohibit and suppress disorderly houses, and the city has enacted an ordinance to that end, one cannot be convicted under the previously-enacted general law, of the offense of keeping a disorderly house. *Rogers v. People* (2 Colo. 450), 146.

CRIMINAL LAW — *Continued.*

9. **Homicide — evidence — relative strength of parties — opinions.]** On a trial for homicide, claimed to have been in self-defense, it is proper to show the relative strength of the deceased and defendant, by facts as to size, muscular development, activity, apparent health, results of tests of strength, etc., but the opinions of non-expert witnesses are not competent. *Stephenson v. State* (110 Ind. 358), 216.
10. — **res gestæ — subsequent statements.]** Statements concerning an encounter made by a party to it, after he has been removed to the office of a physician for surgical attention, and in the absence of the other combatant, are not admissible as part of the *res gestæ*. *Id.*
11. — **evidence — statements of by-standers.]** On a trial for murder, a witness was allowed to testify that when he arrived at the place of the homicide, a bystander pointed to the defendant, whom the witness had just met two doors distant, and said, "there is the man who did the shooting." *Held*, error. *Felder v. State* (38 Tex. Ct. App. 477), 777.
12. — **dying declarations.]** To impeach dying declarations the defendant may prove contradictory statements by the deceased. *Id.*
13. — **perfect and imperfect right of self-defense.]** Where one assails another, intending only an assault and battery, and the assailed resists with violence, and the assailant kills him in self-defense, it is only manslaughter; and if intending to abandon the combat, he retreats as far as he can, and is murderously pursued by the assailed and kills him in self-defense, it is justifiable. *State v. Partlow* (90 Mo. 606), 81.
14. **Husband and wife — slander.]** A husband is not indictable for slandering his wife. *State v. Edens* (95 N. C. 696), 294.
15. **Incest — knowledge.]** In an indictment for incest, it is not necessary, unless required by statute, to allege knowledge of the relationship on the part of the defendant. *State v. Wyman* (59 Vt. 537), 758.
16. — **"brother."] In the statute against incest, "brother" includes a brother of the half-blood. Id.**
17. **Lottery — foreign bonds.]** Bonds were issued by the city of Brussels, of which a certain number were payable with interest each year, and those payable in any year were to be determined by an annual drawing of the numbers by lot. The holders of the bonds bearing the first forty numbers so drawn were to be paid premiums ranging from 25,000 francs for the first to 200 francs for the last. *Held*, that this did not constitute a lottery. *Ex parte Shobert* (70 Cal. 682), 432.
18. **Trial — presence of defendant at impanelling of jury.]** The presence of a prisoner indicted for felony is necessary at the impanelling of the trial jury, and he may not waive the privilege, and his absence is not cured by the subsequent offer of the court to allow him to examine the jurors at the time of making peremptory challenges. *State v. Smith* (90 Mo. 87), 4.

DAMAGES.

1. **Future — eminent domain.]** Where adjoining lots are injured by the construction and operation of a railroad in a city street, the right of action

DAMAGES — Continued.

- vests in the owner of the lots at the time of the construction, and a subsequent grantee cannot recover for injury by the proper use and operation of the railroad. *Chicago and Eastern Railroad Co. v. Leeb* (118 Ill. 203), 841.
2. Measure — broker and customer.] Where a broker purchases stocks for a customer, subject to the customer's order, and wrongfully converts them to his own use, the measure of damages is the market value of the stocks at the time of conversion. *Brewster v. Van Liew* (119 Ill. 554), 838.
3. Non-delivery of telegram — injury to feelings.] In an action for non-delivery of a telegram, whereby the plaintiff was prevented from seeing his brother in his last illness and attending his funeral, compensation for injury to the feelings may be recovered, where the company was notified of the emergency. *Stuart v. Western Union Telegraph Co.* (66 Tex. 580), 623.

See TRESPASS, 634.

DECLARATIONS.

See EVIDENCE, 506.

DEED.

1. Holder under imperfect title — compensation for improvements.] Where a person in peaceable possession under claim of lawful title, but really under a defective title, has in good faith paid assessments and made permanent improvements, the true owner who seeks the aid of equity to establish his title will be compelled to reimburse the occupant for his expenditures. *Thomas v. Evans* (105 N. Y. 601), 519.
2. Reservation — for street.] A warranty deed granted a parallelogram of land, nine chains and ninety-six links long, by five chains and two links wide, "containing five acres, * * * * * reserving from said grant a strip thirty-three feet in width, on the south side of said tract for a public street." Held, that the fee of the thirty-three feet strip passed to the grantee. *Elliott v. Small* (85 Minn. 396), 829.
3. — uncertainty.] A reservation of "three-fourths of an acre as a burying ground for the family and their descendants" is valid, and subsists although the whole tract is subsequently deeded without reservation. *Benn v. Hatcher* (81 Va. 85), 645.

DIVORCE.

See MARRIAGE, 761.

DOWER.

See MARRIAGE, 374.

DYING DECLARATIONS.

See CRIMINAL LAW, 777.

EASEMENT.

- Passage-way — obstruction — bay-window.] Where city lots are conveyed with the reservation of a passage-way, five feet wide, in the rear, with no

EASEMENT — *Continued.*

outlet at one end, for the purpose of access to the street, the rights of abutters on that way are not infringed by the erection of bay-windows projecting over it from thirteen to eighteen inches, not interfering with foot passage. *Burnham v. Nevins* (144 Mass. 88), 61.

ELECTIONS.

Constitutional law — naturalized voter — registration.] A statute providing that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization," is unconstitutional. *Kinneson v. Wells* (144 Mass. 497), 105.

EMINENT DOMAIN.

1. **Public use.]** A strip of land cannot be condemned by a coal company for the construction of a tramway leading from the coal works to a public railroad. *Sholl v. German Coal Co.* (118 Ill. 427), 379.
2. **Vacating streets.]** A lot-owner in a city may not maintain an action against the city for vacating a street not bordering on his lot nor necessary for access thereto, for the purpose of devoting it to a railway. *City of East St. Louis v. O'Flynn* (119 Ill. 200), 795.

See DAMAGES, 841.

ESTOPPEL.

See CONFLICT OF LAWS, 439; CORPORATION, 184, 440; MUNICIPAL CORPORATION, 1.

EVIDENCE.

1. **Books of account — time-books.]** Ordinary time-books, merely used to keep the time of the workmen for a party, are not admissible in evidence under a statute authorizing only the admission of "books of account containing charges by one party against the other." *Van Boery v. Fitzgerald* (21 Neb. 86), 885.
2. **Declarations — as to boundaries.]** Declarations of deceased disinterested adjoining owners of land are admissible to prove private boundaries. *Bethea v. Byrd* (95 N. C. 309), 240.
3. **— of existence of physical pain.]** In an action of damages for personal injuries, declarations of the injured person, some days after the injury, to one who is not a physician, and not for the purpose of professional assistance, that he is suffering pain, are incompetent evidence. *Rochs v. Brooklyn City & Newtown Railroad Co.* (105 N. Y. 294), 506.
4. **— of present suffering.]** Declarations of a party in regard to existing pain and suffering may be proved by the testimony of any person to whom they were made. *Atchison, Topeka and Santa Fe Railroad Co. v. Johns* (35 Kans. 769), 609.
5. **Handwriting — comparison.]** A witness, who had sworn that a signature in question was not in the defendant's handwriting, was shown, on cross-examination, a letter admitted to be in the defendant's writing, and on a

EVIDENCE — *Continued.*

- subject foreign to the case, for the sole purpose of refreshing his memory. *Held*, that the plaintiff's counsel was entitled to ask him if he was still of the same opinion. *National Bank of Chester Co. v. Armstrong* (66 Md. 118), 156.
6. — *comparison of hands.*] Upon an issue as to the genuineness of a handwriting, other instruments admitted to be genuine, but not otherwise relevant, may be received in evidence for the purpose of comparison. *Morrison v. Porter* (85 Minn. 425), 381.
 7. *Measure of proof of criminal act in civil action.*] In an action on a policy of fire insurance, the defense that the insured purposely burned the property need not be established beyond a reasonable doubt; a preponderance of evidence is sufficient. *Continental Insurance Co. v. Jaehnichen* (110 Ind. 59), 194.
 8. *Opinion — of value.*] Any person of ordinary intelligence is competent to testify to the value of a seal-skin coat, although he may never have seen one bought or sold. *State v. Finch* (70 Iowa, 816), 448.
 9. — *safety of highway.*] The safety of a highway is a proper subject of opinion-evidence. *Baltimore and Liberty Turnpike Co. v. Cassell* (66 Md. 419), 175.
 10. *Usage — trade.*] Evidence is admissible to show the usage of particular pork-packers not to keep the product of each customer's hogs separate; also to retain certain portions of the hogs as compensation; also to show that the term "product" in that business has a known peculiar meaning, and does not include those portions of the hogs. *Morningstar v. Cunningham* (110 Ind. 828), 211.
 11. — *"settlement."*] Evidence of a local usage to attach "a peculiar meaning" to the word "settlement" in a mercantile contract is inadmissible. *Susquehanna Fertilizer Co. v. White* (66 Md. 444), 186.

EXECUTOR AND ADMINISTRATOR.

1. *Action by foreign executor.*] An executor appointed in Texas may maintain an action in California in his own name upon a judgment recovered by him as such executor in Texas. *Lewis v. Adams* (70 Cal. 408), 423.
2. *Administrator with will annexed — power to sell land.*] An administrator with the will annexed has no implied authority to execute a power given by the will to the executor to sell land. *Hodgin v. Tools* (70 Iowa, 21), 435.
3. *Foreign — conflict of laws — title to debts.*] M., who was domiciled in Illinois, died intestate in Colorado while temporarily sojourning there, having with him notes given by parties domiciled in Kansas, and a mortgage securing them upon lands in Kansas. Letters of administration were taken out in Colorado by the widow, who there came into possession of the notes and mortgage. Letters of administration were also granted to a son of the intestate in Illinois, but the notes and mortgage never came into his possession. *Held*, that the administratrix could not maintain an action on the notes and mortgage in Kansas. *Moore v. Jordan* (36 Kana. 271), 550.

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EXEMPTION.

See HOMESTEAD, 648; PARTNERSHIP, 292.

EXPRESS COMPANY.

See CRIMINAL LAW, 706.

FALSE IMPRISONMENT.

Abuse of legal process.] An action for false imprisonment will lie for the misuse or abuse of regular legal process. *Wood v. Groves* (144 Mass. 365), 95.

See CORPORATION, 517.

FISHERY.

Public — right of — trespass.] A person may, from a boat, enter upon and walk and fish along the uninclosed flats of another, in the sea, between high and low-water mark, and within one hundred rods of the upland. *Puckard v. Ryder* (144 Mass. 440), 101.

FRAUD.

See MARRIAGE, 761; STATUTE OF LIMITATIONS, 838.

GUARANTY.

See NEGOTIABLE INSTRUMENT, 416.

HANDWRITING.

See EVIDENCE, 156, 331.

HIGHWAY.

Obstruction — abutting owner — damages.] A lot-owner, whose title extends only to the middle of a highway forty feet wide, cannot maintain an action for damages by an unlawful obstruction eleven feet wide, on the opposite side of the center, caused by the construction thereon of a railway embankment, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel nearer to his lot. *Indiana, Bloomington and Western Railway Co. v. Eberle* (110 Ind. 549), 225.

See EMINENT DOMAIN, 796; NUISANCE, 575.

HOMESTEAD.

1. Invalid mortgage by wife — ratification.] A husband executed a mortgage of his homestead, and signed or procured some one to sign his wife's name to it without her authority and procured a notary to certify the acknowledgment as made by his wife. Some weeks after, the wife executed an instrument, attempting to ratify the mortgage. *Held*, invalid. *Howell v. McCrie* (36 Kans. 636), 584.

2. Waiver of exemption — constitutional law.] In the absence of express constitutional prohibition, a statute authorizing the waiver of a homestead exemption, whether made before or after the property is set apart, by an agreement to that effect in the contract or evidence of debt, is valid. *Linkenhoker's Heirs v. Detrick* (81 Va. 44), 648.

See MARRIAGE, 867.

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HOMICIDE.

See CRIMINAL LAW. 81, 216, 777.

HUSBAND AND WIFE.

See MARRIAGE.

IMPROVEMENTS.

See DEED, 519.

INFANCY.

Contract — ratification.] Where an infant executes a purchase-money mortgage for land, and after majority conveys the land, he thereby ratifies the mortgage. *Uecker v. Koehn* (21 Neb. 559), 849.

See NEGLIGENCE, 16, 102, 837.

INNKEEPER.

Liability for baggage of guest after departure.] Where a guest, on leaving a hotel, without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the clerk, and returns within forty-eight hours, the innkeeper is liable as a bailee for want of ordinary care, and the loss of the valise raises a presumption of negligence against him. *Murray v. Marshall* (9 Colo. 482), 152.

INSANITY.

See CONTRACT, 18.

INSURANCE.

1. **Condition — waiver — knowledge of president.]** A policy of life insurance was conditioned to be void if the insured should become so far intemperate as to impair his health, or induce delirium tremens. The insured allowed the policy to become forfeited, transferred it to the plaintiff for a debt, and the latter arranged with the president of the company for its revival, and paid the sums required to keep its policy in force until the insured's death, which happened shortly after the revival. The president knew that the insured had become so intemperate as to injure his health. *Held*, that the company was liable. *Pomeroy v. Rocky Mountain Ins. and Savings Institution* (9 Colo. 295), 144.
2. **"Contiguous."]** A building twenty-five feet from another is not "contiguous" to it. *Olson v. St. Paul Fire and Marine Ins. Co.* (85 Minn. 432), 828.
3. **Interest — assignment.]** One who has no insurable interest in another's life cannot recover upon an insurance policy on such life, assigned to him by the insured and the beneficiaries. *Missouri Valley Life Insurance Co. v. McCrum* (86 Kans. 146), 537.
4. **— property in hands of carrier.]** Where a carrier insured goods in his possession on storage for carriage, "for account of whom it may

INSURANCE — *Continued.*

- concern," *Held*, that although he was not responsible for their safe keeping, he might maintain an action for loss, after his own loss had been paid, for the benefit of the owner adopting the policy, after loss. *Fire Insurance Association of England v. Merchants and Miners' Transportation Co.* (86 Md. 339), 162.
5. "Total loss" of building.] If a building has lost its identity and specific character and has become unfit for use by fire, it is a "total loss." *Hamburg-Bremen Fire Ins. Co. v. Garlington* (86 Tex. 108), 618.
6. Ordinance prohibiting rebuilding.] A city ordinance prohibited the repair or construction of wooden buildings within specified limits, which had been injured by fire to the extent of one-third of their value. An insured building was partly destroyed, and the common council refused an application for leave to repair it. *Held*, a "total loss." *Id.*
7. When proofs of death not necessary.] Where a life insurance company has refused to pay a policy on the grounds of non-membership and forfeiture for non-payment of premiums, no formal preliminary proof of death is necessary. *Kansas Protective Union v. Whitt* (36 Kans. 760), 607.
8. Vacancy.] A tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and with his servants began cleaning it, and they were continuously engaged during the working hours of each day in cleaning and moving goods into the house until Friday evening, intending that the family should be fully domiciled there on Saturday, but on Friday night the house was burned. *Held*, that the house was not vacant. *Eddy v. Hawkeye Ins. Co.* (70 Iowa, 473), 444.
9. Waiver of condition by accepting premium — conditional acceptance.] An insurance policy was conditioned to be void if the insured should engage as a railway brakeman, or in switching or in coupling or uncoupling cars. Consent was refused to engage in such business, and the agent advised the insured to obtain an accident policy, and to keep up the policy in question so that it might be good when he ceased to be employed in that business. He paid a premium while he was a brakeman, the agent then informing him that if he was killed while braking on a train the policy would be void, but if he died in any other way it would be valid, and he replying that he would pay with that understanding. *Held*, that evidence of the foregoing circumstances was admissible to show that the condition was not waived. *Northwestern, etc., Life Ins. Co. v. Amorman* (119 Ill. 339), 799.
10. Warranties — representations.] Where the statement in a policy of insurance, that the answers, statements, etc., in the application "are warranted by the assured to be true in all respects," is followed by the statement, "that if this policy has been obtained by or through any fraud, misrepresentation or concealment, said policy shall be absolutely null and void," which fraud, etc., relates to the answers to the questions in the application, answers not material to the risk, and honestly but mistakenly made in the belief that they were true, will not effect a breach of the policy. *Continental Life Ins. Co. v. Rogers* (119 Ill. 474), 810.

INTEREST.

When recoverable.] Where interest is not payable on the face of the instrument, payment of the principal bars an action for the interest, but where interest is stipulated for in the contract, it is a part of the debt, and may be recovered even after payment of the principal. *King v. Phillips* (95 N. C. 245), 288.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 706.

JUDGMENT.

See PARTNERSHIP, 472.

JURISDICTION.

See OFFICE AND OFFICER, 9

LANDLORD AND TENANT.

See NEGLIGENCE, 159.

LIBEL AND SLANDER.

1. On caterer.] The publication of an article stating that a dinner furnished by a caterer on a public occasion was "wretched," and was served "in such a way that even hungry barbarians might justly object," and that "the cigars were simply vile, and the wines not much better," is not actionable, *per se. Dooling v. Budget Publishing Co.* (144 Mass. 258), 83.

2. Of property — damage.] A false and malicious publication that a horse was twenty-one years old, when the defendant knew him to be only twelve, is actionable on proof of special damages, but the loss of sale to some particular person must be averred and proved. *Wilson v. Dubois* (85 Minn. 471), 835.

See CRIMINAL LAW, 294.

LICENSE.

To construct second story on licensor's building.] A written agreement that one may construct a second story on another's building, and "have and own said second story" for his use perpetually, confers no interest in the freehold. *Thorn v. Wilson* (110 Ind. 825), 209.

LIEN.

See CONTRACT, 496.

LOTTERY.

See CRIMINAL LAW, 422.

MALICIOUS PROSECUTION.

See MUNICIPAL CORPORATION, 22.

MALPRACTICE.

Physician—degree of skill required—evidence.] In an action against a surgeon for malpractice, evidence of his reputation, in the community and among his profession, as to skill, is inadmissible. *Hottel v. Hoy* (118 Ill. 584), 390.

MARRIAGE.

1. **Deed from husband to wife—homestead.]** A deed of land is not invalid because executed by a husband directly to his wife, nor because it conveys a homestead, a conveyance of which is by statute required to be executed by both husband and wife. *Furrow v. Athey* (21 Neb. 671), 867.
2. **Divorce—alimony—fraudulent conveyance.]** S. was convicted and imprisoned for arson, and his wife procured a divorce therefor, and the court granted her alimony. Before, and in anticipation of the conviction and divorce, he fraudulently transferred his personalty to G., in trust for his wife so long as she remained his wife, and in case she procured a divorce, for his mother and brother. The defendant F. attached the fund under a judgment which he had obtained against S. for burning his property. On interpleader by the trustee, *held*, that the transfer was void as to the wife, and the fund belonged to her by virtue of the decree for alimony, and that F.'s claim, being founded in tort, did not attach to it. *Green v. Adams* (59 Vt. 603), 761.
3. **Dower—barred by ante-nuptial agreement.]** An ante-nuptial agreement, by adults, fairly understood, that each party releases the right of dower in the lands and estate of the other, and permits the other to hold his or her separate property free of all claims growing out of the marriage, bars the wife's dower. *Barth v. Lines* (118 Ill. 874), 874.
4. **Promise of wife during and after coverture—consideration.]** The promise of a married woman, having a separate estate, to pay for necessities furnished her upon the credit of her estate, will sustain a new promise to pay for them made after the death of her husband. *Sherwin v. Sanders* (59 Vt. 499), 750.
5. **Tenancy by entireties.]** Under a statute enabling married women to own real estate in the same manner as single women, a deed of lands to husband and wife still constitutes them tenants by the entirety. *Buttler v. Rosenblath* (42 N. J. Eq. 651), 52.
6. **Validity.]** The mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient to constitute marriage at common law, but in Kansas the legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and prescribe penalties against those who solemnize or contract marriage contrary to statutory command. *State v. Walker* (86 Kans. 297), 556.
7. **Statutory requirements.]** Punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void. *Id.*
8. **Misdemeanor.]** Under section 13 of the marriage act, all persons who enter the marriage relation and live together as man and wife, without complying with the conditions and regulations of the act, are guilty of a misdemeanor, and subject to the punishment imposed by that section. *Id.*

See CRIMINAL LAW, 294; HOMESTEAD, 584.

MASTER AND SERVANT.

1. **Contributory negligence — using defective machinery.]** An employer who uses implements or appliances, in the performance of his master's work, which have become out of repair and unsafe, must either make the necessary repairs himself or report the fact to the employer or person having charge of the repair, and if he omits to do so, and is injured in consequence, he cannot recover from the employer. *Stroble v. Chicago, Milwaukee and St. Paul R. Co.* (70 Iowa, 555), 456.
2. —.] When a master has furnished implements perfect of their kind but not designed for or adapted to the performance of his work, and a servant objects to using them on this account, but continues to use them, he will be held to have assumed the risk. *Texas and Pacific Railway Co. v. Bradford* (66 Tex. 782), 639.
3. — narrow railway bridge.] On the defendant's railway was a bridge with sides five feet high, coming up one foot above the floor of the engine-cab, and thirteen and a half inches from the sides of passing engines. The plaintiff's intestate, a fireman, well knowing the character and situation of the bridge, without orders and in violation of the rules, opened the ash-pan, whereby fire was communicated to wooden waste in a journal box. Then without orders or necessity, he stood outside of the engine on the steps of the engine and tender, and endeavored to extinguish the fire with a hose, and while so employed he was struck by the side of the bridge and killed. *Held*, that the company was not liable. *Sheeler's Administrator v. Chesapeake and Ohio Railroad Co.* (81 Va. 188), 654.
4. **Defective machinery — employment of competent servants.]** In an action against a manufacturing corporation for injuries received by an employee by reason of a defect in the machine on which he was employed, a request to instruct the jury "that the making of such ordinary repairs as the machine requires, and the keeping of it in order, from day to day, may be intrusted to servants; and if the master employs competent servants for that purpose, and supplies them with suitable means, the master performs his duty," is rightly refused, where there is evidence that the servants employed to repair the machine did not use due care in their repairs, or in giving warning of danger. In such a case it should be submitted to the jury whether the defendant had exercised a reasonable supervision over its servants, and over the manner in which the machinery was kept in repair. *Rogers v. Ludlow Manufacturing Co.* (144 Mass. 196), 68.
6. —.] The plaintiff, who was employed in the defendant's mill, was injured by a weight which fell from a machine, to which it was attached by a rawhide lacing; the use of the weight being so to operate on a pulley as to regulate the winding of yarn on a bobbin. *Held*, that the court properly ruled that the weight was a part of the machine, and correctly instructed the jury that if they found that the weight, as held up by the lacing, was not a proper machine, and that the defendant knew, or ought to have known, that fact, the defendant was liable if the accident happened while the plaintiff was in the exercise of due care, although the defendant had employed competent persons to attend to the machine. *Rice v. King Phillip Mills* (144 Mass. 229), 80.

MASTER AND SERVANT — *Continued.*

6. **Railway brakeman — scope of employment — infant trespasser.**] A boy fifteen years old wrongfully boarded a freight train to ride without paying fare, and a brakeman ordered him to jump off while the train was moving rapidly, and he fearing being thrown off, jumped and was injured. *Held*, that the company was liable. *Kansas City, etc., Railroad Co. v. Kelly* (86 Kans. 655), 596.

MORTGAGE.

1. **Mortgagee permitting mortgagor to retain custody — fraudulent cancellation by latter.**] If a mortgagee permits the mortgagor to retain the mortgage, and the latter fraudulently cancels it of record, the mortgagee cannot enforce it as against a subsequent *bona fide* grantee. *Heyder v. Escalior Building Loan Association* (42 N. J. Eq. 403), 49.
2. **Redemption — accident — relief from.**] The mortgagor had taken means to obtain the money for redeeming the premises from foreclosure, which rendered it reasonably certain that he would succeed; but by reason of the failure of the party promising the money, to meet him at the appointed time, he was delayed until after banking hours, and was thereby prevented from sending the money to the clerk of the court in season for payment within the time limited by the decree. *Held*, an accident, and that the mortgagor was entitled to redeem. *Kopper v. Dyer* (59 Vt. 477), 742.

See ASSIGNMENT FOR CREDITORS, 833.

MUNICIPAL CORPORATION.

1. **Change of grade of street — damages — estoppel.**] An owner of land who joins in a petition to the common council, asking for a change of grade of a street, is estopped from claiming damages on account of the grading, as asked for, upon the ground that the petition was not signed by the owners of a majority of the front of land on the part of the street improved. *Cross v. City of Kansas* (90 Mo. 18), 1.
2. **Malicious prosecution.**] A municipal corporation is not liable for a mere malicious prosecution. *Brown v. City of Cape Girardeau* (90 Mo. 377), 28.
3. **Negligence — icy sidewalk.**] A city is not bound to remove, or sprinkle with ashes or sand, ice formed upon a sidewalk by severe cold suddenly following a fall of rain or the melting of snow, and is not liable for an injury to a person falling thereon, in the absence of evidence connecting the injury with some structural defect. *Taylor v. City of Yonkers* (105 N. Y. 208), 492.
4. **Ordinance as to keeping gunpowder.**] An ordinance requiring the removal of powder magazines from a city is valid, although the city had sold the sites to the owners for the purpose of erecting such magazines. *Davenport v. City of Richmond* (81 Va. 636), 694.
5. — **victualing-shops.**] Under a charter power to regulate victualing-houses, a village may impose a penalty of ten dollars for keeping one without a license. *St. Johnsbury v. Thompson* (59 Vt. 301), 731.

NEGLIGENCE.

1. **Concurrent — imputability.]** *Philadelphia, etc., Railroad Co. v. Hoagland* (66 Md. 149), 159.
 2. **Contributory — child playing on highway — "traveller."]** A child seven years of age, while walking in the evening beside his father on a plank footway upon a bridge, which the defendant city was bound to keep in repair, stepped aside to clasp in sport a post forming part of the bridge, and fell through a hole in the planking, eleven inches square, near the post, not known to either the boy or his father, into the water and was drowned. The father knew of the boy's intention to clasp the post, and did not forbid his doing so. *Held*, not contributory negligence *per se*. *Gulline v. Lowell* (144 Mass. 491), 102.
 3. **Dangerous premises — infant trespasser.]** An action for the death of a child by falling into an unfenced pool of hot water discharged on the defendant's distillery premises, sixty feet from the highway, and two hundred and twenty-five feet from any house, may not be maintained without proof that the place was attractive to children, or that to the defendant's knowledge they resorted there for amusement. *Schmidt v. Kansas City Distilling Co.* (90 Mo. 284), 16.
 4. **Imputable — of driver of private carriage.]** *Follman v. City of Milwaukee* (85 Minn. 522), 340.
 5. **Injury to child by cars in grading street.]** The defendant, a contractor for grading a city street, employed cars in transporting earth in that work. A young child climbed upon one of the cars to ride, and jumped or fell off and was killed. *Held*, that the defendant was bound only to ordinary care; was not bound to keep a watchman to prevent such occurrences, and was not liable. *Emerson v. Peteler* (85 Minn. 481), 387.
 6. **Landlord and tenant — defective premises — injury to third person.]** Where the owner of a wharf leases it, and knows, or by the exercise of reasonable diligence might have learned, that it is in unsafe condition, he is liable to a third person injured by reason of its condition while lawfully on it. *Albert v. State* (66 Md. 325), 159.
- See* CARRIER, 156, 428, 632; MASTER AND SERVANT, 68, 80, 456, 639, 654; MUNICIPAL CORPORATION, 492; RAILROADS, 784.

NEGOTIABLE INSTRUMENT.

1. **Accommodation note to be discounted at particular bank — diversion.]** Where a note was made and indorsed for accommodation, negotiable and payable at a particular bank, and was not discounted there but was sold to a private individual, without the indorser's knowledge, *held*, that the indorser was liable. *Parker v. McDowell* (95 N. C. 219), 235.
2. **Contract of indorsement — where made.]** Where a payee indorses a note in one State, and the note is sold and delivered in another State, the contract of indorsement must be regarded as made in the place where the sale and delivery occurred. *Briggs v. Latham* (86 Kans. 255), 546.
3. **Letter of credit — guaranty to third person.]** Defendants addressed to the M. bank a letter stating that at the request of M. & Sons, the defendants

NEGOTIABLE INSTRUMENT — *Continued.*

authorized L. & Co. to draw on said bank on defendant's account to a specified amount, for twelve months. This letter was deposited by M. & Sons with the plaintiff as security for advances. *Held*, that the defendants were liable thereon as on a guaranty. *Lafargue v. Harrison* (70 Cal. 380), 416.

4. Partnership — dissolution.] One partner after dissolution may waive notice of demand and non-payment of a note indorsed by the firm and discounted for it. *Soldner v. Mount Jackson National Bank* (66 Md. 488), 190.

5. Waiver of protest.] A telegram directing the holder to "pay note and save protest," and to "draw on" the partner, is a valid waiver. *Id.*

See CORPORATION, 853.

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NUISANCE.

Construction of highway — common injury — school district.] A school district cannot maintain an action for the obstruction of a highway, impeding access to the school-house, unless it suffers an injury not common to the public. *School District v. Neil* (36 Kans. 617), 575.

OFFICE AND OFFICER.

Action for refusal to perform ministerial duty — jurisdiction.] One may maintain, in Missouri, an action of damages against a county commissioner of Kansas for refusing to obey a *mandamus* to levy a tax to pay a judgment against the county. *St. Joseph Fire and Marine Ins. Co. v. Leland* (90 Mo. 177), 9.

OPINIONS.

See EVIDENCE.

ORDINANCE.

See MUNICIPAL CORPORATION, 694, 781.

PARTIES.

Joint contract — severance.] Joint contractors must all sue upon their joint contract, although one of them has been settled with, unless all the parties agree to the severance of the joint interest, and the obligor promises to pay each his several share, and the suit is based upon the new promise. *Angus v. Robinson* (59 Vt. 585), 758.

See ACTION, 844.

PARTNERSHIP.

1. Insolvency — right to use firm name.] C. W. D. & Co., a copartnership which had acquired an extensive trade and reputation as dealers in seeds, made an assignment for the benefit of creditors, and the assignee sold the stock to the plaintiff company, which continued the business at the old stand, renting the building from the owner. Among the stock so purchased was a large number of wrappers, sacks, etc., marked with the name of C. W. D. & Co. One of the firm of C. W. D. & Co. was also a member of the plaintiff company. Afterward C. W. D. organized a corporation under the name of C. W. D. & Co., and engaged in the same business in the same city. The plaintiff claimed, but never exercised, the right to use the name of C. W. D. & Co. *Held*, that the plaintiff was not entitled to an injunction restraining the defendant from using that name and receiving mail matter thus directed. *Iowa Seed Company v. Dorr* (70 Iowa, 481), 446.

2. Judgment on joint obligation of all partners — rights of creditors.] On a judgment against all the members of a firm upon a joint obligation, not an indebtedness of the firm, the property of the firm may be levied on and sold, and the purchaser will acquire absolute title as against subsequent creditors of the firm, although it may be insolvent. *Saunders v. Reilly* (105 N. Y. 12), 472.

3. Lien of partners — exemption.] One partner has no lien on a copartner's interest in the partnership property for a debt due to him from the copartner. *Evans v. Bryan* (95 N. C. 174), 238.

See BANKS, 807; NEGOTIABLE INSTRUMENT, 190.

PATENT.

Right to, in insolvency.] Letters-patent of the United States, owned by an insolvent debtor, pass to his assignee in insolvency. *Barton v. White* (144 Mass. 281), 84.

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See ACTION, 844.

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RAILROADS.

1. *In street — duty to keep street safe — statute.*] A railroad charter empowered the company to lay its track across any public highway or street, if necessary, on condition that it should put such highway or street "in such condition and state of repair as not to impair or interfere with its free and proper use." *Held*, that this was a continuing duty, and that although a crossing might have been adequate when constructed, yet if by reason of increase of business of the railroad or travel on the street it became dangerous or seriously obstructed travel on the street, the company was bound to provide some other mode of crossing, as by carrying the street over or under the track. *State v. St. Paul, etc., Co.* (35 Minn. 181), 318.
2. *Leased — liability for negligence.*] Where a railroad company, with the approval of the legislature, exclusively leased its road to another company for ninety-nine years, and by the lessee's neglect combustibles on the railroad land communicated fire to adjoining buildings, *held*, that the lessor was liable. *Balsley v. St. Louis, etc., R. Co.* (119 Ill. 68), 784.
3. *Steam, in street — servitude.*] The public authorities may authorize the construction and operation of a railway for passengers in a city street, without compensation to adjacent lot-owners, although the railway is operated by steam-motors, and is used also to transport passengers from its terminus in the city to a point eighteen miles outside the city. *Newell v. Minneapolis, etc., R. Co.* (35 Minn. 112), 308.
4. *Ultra vires.*] Such a lot-owner, the defendant being in possession of the street, may not raise the objection of *ultra vires*. *Id.*
5. *Exemption from taxation — elevator leased to private parties.*] A railroad company built on its lands a grain elevator, and leased it to private parties, who used it in the company's business, but received the tolls and

RAILROADS — *Continued.*

compensation for themselves. *Held*, not exempt from taxation as property or "accommodations necessary to accomplish the objects of its incorporation." *Matter of Suigert* (119 Ill. 88), 789.

6. Unjust discrimination — contract for rebate.] A contract between a railroad company and a shipper, that the latter shall pay the regular and established rates of freight, the same as all other shippers, and that the company shall pay back to him a certain portion of the freight so charged and paid, whereby such shipper will pay a less rate for transportation than that paid by others, and the public generally, for like services, under similar circumstances and for like distances, is void as against public policy at common law, and under the statute against unjust discriminations. *Illinois, etc., R. Co. v. Ervin* (118 Ill. 250), 869.

See CARRIER; MASTER AND SERVANT, 596; STATUTE, 250.

RESTRAINT OF TRADE.

See COVENANT, 676.

SALE.

1. "Prompt shipment" — condition precedent.] On a sale, on February twenty-second, of iron "for prompt shipment," the iron was the next day put on board ship, in a German river, frozen over and unnavigable, forty miles from the sea, and so remained till April third. *Held*, that prompt shipment was a condition precedent, and that the known unnavigable condition of the river did not excuse the delay. *Tobias v. Lissberger* (105 N. Y. 404), 509.
2. Separation — when not essential to transfer title.] Where a certain number of articles are sold from an ascertained lot, identical in kind and value, a separation is not essential to transfer title. *Kingman v. Holmquist* (86 Kans. 785), 604.
3. Of intoxicating liquors — furnishing members of club.] A number of persons in Raleigh, in 1885, organized and incorporated a club for social and literary purposes. The members, but no other persons, were permitted to purchase from the defendant, its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, simply sufficient to cover the cost. In 1896, at an election in Raleigh, under the Local Option Act, a majority of the votes cast were for prohibition. *Held*, (1) That such furnishing liquors under these circumstances was a sale. (2) That such sale was a misdemeanor under the Local Option Act. *State v. Lockyear* (95 N. C. 638), 287.

SCHOOLS.

See CRIMINAL LAW, 776; NUISANCE, 576.

SET-OFF.

See BANKS, 807.

SLEEPING-CAR COMPANY.

Liability for refusing berth.] A railroad corporation and a palace car company executed a contract, by which the car company was to furnish passenger cars for the corporation, keep them in order, and provide employees to collect the fare from passengers in such cars and attend upon them, and its employees were to be governed by the rules and regulations of the railroad corporation. The railroad company was to provide fuel, and the railroad conductors had full authority over the employees of the palace cars in determining who should ride in the cars, and in what circumstances. A regulation of the railroad corporation provided that between B. and N. a ticket for a sleeping berth in the palace cars should be sold only to one holding a ticket over the whole route. A., who had a ticket from B. to P., an intermediate station, and another ticket from P. to N., applied for a sleeping berth ticket from B. to N. but the ticket agent refused to sell it to him, because he did not have a single through-ticket to N. A. then entered the palace car at B., and the conductor of that car refused to sell him a sleeping berth for the same reason, and the train conductor also refused to furnish A. with a sleeping berth unless he would pay full fare from B. to N., which he declined to do. The train conductor, after A. had repeatedly refused to leave the car upon his request, placed his hand upon him, when A. arose, and the palace car conductor took hold of A.'s arm. A. then walked to the door of the car, the train conductor opened it, and the palace car conductor again took hold of A.'s arm and led him across the platform, the train being in motion, and into another car, the door of which was opened by the train conductor. This car was provided with reclining chairs, one of which A. occupied; and during the night the car became cold, in consequence of which A. caught a severe cold. *Held*, that A. could not maintain an action against the palace car company. *Lawrence v. Pullman's Palace Car Co.* (144 Mass. 1), 58.

STATUTE.

1. **Discrimination in railroad freights.]** Discrimination in freight tariffs by railway companies means charging different shippers unequal sums for carrying the same quantity equal distances. *Freight Discrimination Cases* (95 N. C. 434), 250.
2. **Construction.]** A statute imposing a penalty on any railroad which shall charge for transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad, of equal distance, means that the compensation charged shippers for carrying an equal quantity of the same class of freight, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, at any time while its list of charges for carrying freight remains unchanged. *Id.*
3. **Pawn-broker — "property."] One who lends money of his own or of others, and takes security by mortgage on real or personal property, or by stocks, bonds or notes, is not a pawn-broker.** *City of Chicago v. Hulbert* (118 Ill. 632), 400.

STATUTE — *Continued.*

4. "Public performances and exhibitions" — skating-rink.] A skating-rink is not within a statute requiring a license to be taken out for "public performances or exhibitions." *Harris v. Commonwealth* (81 Va. 240), 686.
5. Time of taking effect.] Where a statute provides that it shall take effect "from and after its passage," in computing the time when it takes effect the day of its passage is to be excluded. *Parkinson v. Brandenburg* (35 Minn. 294), 326.

See CARRIER, 404; CONSTITUTIONAL LAW, 859; RAILROADS, 818.

STATUTE OF LIMITATIONS.

1. Application of payments — individual and partnership debt.] When one owes another upon an individual and also upon a partnership account, and makes general payments without any application, without protestation against further liability, and the payments amount to more than the individual account, the law will apply the balance on the partnership account to remove the bar of the statute of limitations, although the creditor, without definite knowledge of the standing of the two accounts, gave the debtor credit for all the payments on his individual account. *Robie v. Briggs* (59 Vt. 448), 787.
2. Demand — reasonable time.] Where a right of action accrues only upon certain preliminary proceedings and a demand, such proceedings and demand must be had and made within a reasonable time to prevent the statute of limitations from attaching. *Atchison, Topeka, etc., R. Co. v. Burlingame Township* (86 Kans. 628), 578.
3. Fraud.] A statute prescribes the time within which may be commenced "an action for relief on the ground of fraud," and provides that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Held, that the statute will begin to run from the time when the party became aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which pursued would lead to such discovery. *Parker v. Kuhn* (21 Neb. 418), 888.
4. Payment by joint-debtor.] A payment by one joint-debtor, before the statute of limitations has run upon the obligation, does not postpone the statute as to another. *Willoughby v. Irish* (35 Minn. 68), 297.
5. Principal and surety.] A claim barred by the statute of limitations as against the principal debtor is barred also as against the surety. *Auchampaugh v. Schmidt* (70 Iowa, 644), 459.

See DEED, 829; EMINENT DOMAIN, 795.

SURETY.

See BOND, 880; STATUTE OF LIMITATIONS, 459.

TAXATION.

- Constitutional law — drummers.] A State statute imposing a license tax on drummers, and allowing drummers paying a dealer's tax an equal rebate on their purchase tax, is not unconstitutional. *State v. Long* (95 N. C. 562), 268.

See CONSTITUTIONAL LAW, 783; RAILROADS, 799.

TELEGRAPH.

Telephone — discrimination.] A telephone company being bound by statute to receive dispatches from and for all telegraph companies, may not justify a discrimination in favor of a particular telegraph company by the fact that its contract with the company controlling the telephone patents requires it to do so. *Chesapeake and Potomac Telephone Co. v. Baltimore and Ohio Telegraph Co.* (66 Md. 899), 187.

See DAMAGES, 628.

TELEPHONE.

See TELEGRAPH, 167.

TENANCY.

See MARRIAGE.

TRESPASS.

Measure of damages — negligence.] A judgment creditor purchased a tract of land with a factory and machinery on it, on sale under his execution, and continued to carry on the factory by the judgment debtor as agent, until it was destroyed by fire. The judgment debtor claimed the property as exempt, and sued for the land and the value of the factory and machinery. *Held*, that if the property was exempt and the fire was immediately caused by the defendant's negligence, the defendant was liable, but not otherwise. *Willis v. Morris* (66 Tex. 628), 634.

TRIAL.

See CRIMINAL LAW, 4.

USAGE.

See EVIDENCE, 186, 211.

USURY.

Penalties — action for, in another State.] Penalties imposed by the usury laws of one State are not recoverable in another. *Blaine v. Curtis* (59 Vt. 120), 702.

WATER AND WATER-COURSE.

1. **Common dam — duty to maintain — damages.]** Where two mill-owners on the same stream, one below the other, have a mutual interest in the dam propelling both mills, they are, in the absence of contract, under a mutual duty to maintain it, and liable to contribute thereto in proportion to their respective interests, and the lower owner is not entitled to damages for the upper owner's unnecessary delay in repairing the dam. *Webb v. Laird* (59 Vt. 108), 699.
2. **Lake — reliction.]** A lake in North Carolina, fifteen miles by eight, three and a half feet deep, with no important inlet, and forming no link in a chain of water communication, is not navigable, and a riparian owner thereon has no title to the land under it as against the grantee of the State, upon gradual reliction. *Hodges v. Williams* (95 N. C. 331), 242.

WAY.

See EASEMENT, 61.

WILL.

1. **Condition against opposition.]** "If any or either of my children shall enter a caveat against this my will, he or they shall pay all expenses of both sides," is a good condition in a will, without a gift over, against a devisee under the will. *Host v. Host* (42 N. J. Eq. 388), 43.
2. **Construction — "dying without issue."]** The will of E. devised and bequeathed to her daughter, Minnie, all her real and personal estate, subject to the payment of certain legacies charged thereon. In case of the death of Minnie, "without issue," the property was given to the husband and a sister of the testatrix during life, and after their deaths to four brothers. The clause ended as follows: "The devise over to my husband, sister and brothers, to depend upon the contingency of my daughter Minnie dying without issue." Minnie survived the testatrix. *Held*, that she took a conditional fee, defeasible by her dying without leaving issue living at the time of her death; that her children, should she leave any, would inherit from her, but a conveyance by her would be effectual against them, and carry an indefeasible title in fee, and that the contingent expectant estate, limited to the husband, sister and brothers, would be cut off by their joining with her in the conveyance. *Matter of New York, Lackawanna and Western R. Co.* (105 N. Y. 89), 478.
3. **— repugnancy — life estate or fee.]** A will gave to the testator's wife the residuum "for her benefit and support, to use and dispose of as she may think proper," and then provided that if any of the estate should be left in her possession at her death it should be equally divided between the brothers and sisters of the testator. *Held*, that the wife took an absolute estate, and that the remainder over was void for repugnancy. *Stowell v. Hastings* (59 Vt. 409), 748.
4. **Execution — presence — request to witnesses.]** The testatrix's friend, S., said to her: "These gentlemen, F. and R., have come to witness the will." She bowed her head. The will was read to her by F. in an audible voice; and on being asked if she understood it, she bowed again. She then signed the will. The witnesses, F. and R., subscribed the will at a table in the room near the foot of the bed. She was so lying that she was obliged to see them, unless she shut her eyes or turned her head away. *Held*, a valid execution. *Baldwin v. Baldwin's Executor, etc.* (81 Va. 405), 669.
5. **Lost or destroyed — proof by one witness.]** The contest of a lost or destroyed will may be proved by one witness. *Matter of Page* (118 Ill. 576), 895.
6. **Declarations by testator.]** Declarations by a testator, after execution of his will, are admissible in case of its loss, to show that it was not cancelled and to prove its contents. *Id.*

WILL — *Continued.*

7. "Next of kin."] A testator provided that if any of certain legatees "shall die before my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." One of these legatees died in the life-time of the testator, leaving as his nearest relatives a brother and three nephews, sons of a deceased brother, all of whom survived the testator. *Held*, that the brother of the legatee was entitled, to the exclusion of the nephews. *Swasey v. Jaques* (144 Mass. 185), 65.

See EXECUTOR AND ADMINISTRATOR, 435.

WITNESS.

- Child — inability to comprehend oath.] A child of seven years of age, who does not understand the process of being sworn as a witness, nor the consequences of perjury in this life or after death, is not a competent witness. *Holt v. State* (33 Tex. Ct. App. 1), 770.

WORDS.

1. Accident.] *See* MORTGAGE, 742.
2. Brother.] *See* CRIMINAL LAW, 753.
3. Contiguous.] *See* INSURANCE, 838.
4. Dying without issue.] *See* WILL, 478.
5. Messenger.] *See* CARRIER, 404.
6. Next of kin.] *See* WILL, 65.
7. Product.] *See* EVIDENCE, 211.
8. Prompt shipment.] *See* SALE, 500.
9. Property.] *See* STATUTE, 400.
10. Public performances and exhibitions.] *See* STATUTE, 622.
11. Settlement.] *See* EVIDENCE, 186.
12. Total loss.] *See* INSURANCE, 613.
13. Traveller.] *See* NEGLIGENCE, 102.











